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IN THE

Supreme Court of the United States

October Term, 1949

No. 225

THE ANDREW JERGENS COMPANY, a corporation,

Petitioner,

vs.

NATIONAL LABOR RELATIONS BOARD,

Respondent.

PETITION FOR CERTIORARI.

(Pages 1 to 17.)

BRIEF ACCOMPANYING PETITION.

(Pages 19 to 57.)

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IN THE

Supreme Court of the United States

October Term, 1949

No.....

THE ANDREW JERGENS COMPANY, a corporation,
Petitioner,

vs.

NATIONAL LABOR RELATIONS BOARD,
Respondent.

Petition of The Andrew Jergens Company, a Corporation, for a Writ of Certiorari Directed to the Court of Appeals for the Ninth Circuit.

(Pages 1 to 17.)

To the Honorable Fred M. Vinson, Chief Justice, and to the Honorable Associate Justices of the Supreme Court of the United States:

Your Petitioner hereby prays for a Writ of Certiorari directed to the Court of Appeals of the United States for the Ninth Circuit to review the decree of that Court entered on the 17th day of May, 1949 [Petition for Rehearing denied June 24, 1949; R. 578], enforcing the order of the National Labor Relations Board.

The Board's order made in February, 1948, relates to an asserted refusal to bargain with the General Warehousemen's Union (the Teamsters) in January, 1946, and requires Petitioner to bargain with the Teamsters and to refrain from unilaterally increasing wages. It is admitted that Petitioner bargained freely as to all issues of the contract other than union security.

Summary and Short Statement of the Matter Involved.

Petitioner has been ordered to bargain with a Union of which for two years none of its employees has been a member. The Court of Appeals has approved the action of the National Labor Relations Board by enforcing this order, when the Board assumed the existence of a continuous majority in the certified Union until the date of its order. [R. 110.] The fact is that no Union members were in Petitioner's employ, and the Board has so conceded in its brief before the Court of Appeals [R. 567] in response to Petitioner's motion to adduce such evidence. In this respect, the Board admittedly exercised no discretion as to whether its order would effectuate the policies of the Labor Management Relations Act.

The decree of enforcement is not conditioned upon compliance with Section 8 (a) (3) of the Act [29 U. S. C. A. 158 (a) (3)], and its scope extends far beyond the acts sought to be prohibited.

The Board and the Court of Appeals held that Petitioner has refused to bargain collectively as to union security, by failing to respond more promptly to a Union ultimatum reinforced by strike and boycott measures, and with respect to wages by following the national pattern of wage increases, a standard previously agreed upon with the Union.

The Court of Appeals reviewed the proceedings of the Board under the statutory provision in effect at the time of the hearing before the Trial Examiner, without regard to the strictures of the Administrative Procedure Act [5 U. S. C. A. §1001] and the Labor Management Relations Act, 1947 [29 U. S. C. A. § 141].

Summary of Facts.

These results have been accomplished in the following factual setting (all record references, with a few minor exceptions, are either to the findings of the Board or the decision of the lower Court):

Within two weeks after the Teamsters Union had been certified, the parties met and negotiated, on January 17, 1946. A contract presented by the Union's representative was compared and discussed, clause by clause, with a contract which had been drafted by Petitioner as a basis for their negotiations with a prior union. [R. 25.] There was no substantial disagreement as to any of the issues other than union security, but the Union objected to any final agreement on any issue until the union security question had been settled. [R. 25, 26, 31, 32, 33, 36, 105, 109, 562.] The union security clause was fully discussed. [R. 24-39.] Petitioner's representatives stated that they had no authority to agree upon any form of union security without taking it up with Petitioner. [R. 562.]

There was conflict in the testimony of one of the Union's witnesses, Attorney Stevenson, as to whether the Petitioner's representatives had said they had no authority to *negotiate* union security. At one point this witness stated, in accordance with the testimony of all other witnesses, that the position of the Petitioner's representatives was that they could not *agree* to union security without taking it up with Petitioner. [R. 288.] At another point in his testimony this same witness, however, testified that the Petitioner's representatives said that they had no authority to negotiate concerning union security, and this latter statement was apparently accepted by the Board. Similarly, the Union stated that it would have to sub-

mit any agreement on its part to its own membership. [R. 26.]

Petitioner requested that an outstanding War Labor Board order (18 W. L. R. 582) be modified by joint application in order to permit Petitioner to enter into a contract with the present Union and to grant the 5¢ wage increase therein provided for, retroactive to 1943. The Union took the position that the War Labor Board order was a nullity, that they would have nothing to do with it, and would not join in an application to modify the order. [R. 28.] Petitioner took the position that without a modification it could not safely enter into a union security contract or grant an increase without subjecting itself to a possible penalty of disallowance for tax purposes of the entire payroll for four years. [R. 41.] Such an order would not be modified unless the Union joined in the application to the War Labor Board.

During the week of February 11, 1946, the Union unilaterally fixed the deadline of Monday, February 18th, for Petitioner to agree to grant union security. [R. 37.] On February 15, 1946, Petitioner addressed a letter to the Union in which it restated its position that no action could be taken unless the War Labor Board order was disposed of by joint application and stated its willingness to continue negotiations as to the other provisions of the contract. [R. 38, 562.] On the morning of February 16th, prior to the receipt of Petitioner's letter, the Union placed a strike and boycott in effect. [R. 562, 342-3.] Except as later restrained by the California Court, the Union continued to utilize every weapon in its power, lawful and unlawful, to put Petitioner out of business. [R. 435-6.]

On July 1, 1946, Petitioner put into effect a new wage schedule with an increase of approximately 15¢. This increase was within the limits authorized by Presidential Decree and by orders of the War Labor Board settling various national disputes, which settlement the Union's representatives stated in the January meeting would be agreeable. [R. 30.]

1 Labor Arbitration Reports, CXL;
2 Labor Arbitration Reports, XXIX.

At the time of the increase, all negotiations had been suspended for five months, and Petitioner had received no reply to its letter of February 15, 1946.

The Union has never expressed at any time willingness to negotiate whether or not the contract should contain a union security clause, but, as stated and found by the Board and by the Court below, and conceded by the Board's brief, has only been willing to negotiate upon condition that Petitioner agree to a union security clause. [R. 36, 562.]

In February, 1948, the Board issued its order requiring Petitioner to bargain with the Teamsters' Union (as to union security) and to refrain from unilaterally increasing wages. [R. 111-113.]

Three and one-half years after the asserted refusal to bargain, the Court of Appeals has ruled that it will enforce the Board's order without modification, although it was conceded by the Board in response to Petitioner's motion to adduce additional evidence, that as of January 1, 1948, the Teamsters did not contain in its membership any employees of Petitioner, and the Court has accepted the Board's argument that this fact was immaterial and need not be considered by the Board in framing its order.

The Decision of the Lower Court.

The holding of the Court of Appeals is that Petitioner was properly ordered to bargain with respect to union security, which was "the single significant issue remaining between the parties" [Findings R. 109, R. 562]; that this order need not provide for an election as required by the Labor Management Relations Act [29 U. S. C. A. 158 (a) (3)]; that the delay of three and one-half years from the asserted refusal to bargain is immaterial; that the fact that the Board has given no consideration to change in circumstances or to the complete loss of membership on the part of the Union but on the contrary has erroneously assumed in issuing the order that the Union has retained its majority [R. 110], is immaterial; that as a matter of law Petitioner is responsible for the loss, under the established Board policy, without any such determination by the Board or any exercise of discretion by it.

The decision holds that a general wage increase granted after negotiations had been terminated and the strike had been in progress for five months was a refusal to bargain, although the increase granted was within the amount negotiated with the Union and the impasse had arisen solely with respect to union security.

The decision holds that the Board in making its order after the amendment of the Act [U. S. C. A. 160(b)] was not bound by the existing Act [R. 573]; the Court does not consider whether the statutory requirements have been complied with and does not review the findings of the

Board, but itself goes outside the findings and supplements them with findings of its own.

The decision exhibits an entirely new concept of collective bargaining, holding that the Union may require that discussions be suspended until Petitioner accedes to the ultimatum for union security; that a four weeks' delay in replying constituted refusal to bargain and that Petitioner's request that the parties seek a modification of the War Labor Board order that Petitioner enter into a union security agreement with a different Union was unreasonable; that the Union was justified in placing an arbitrary deadline for a reply to its ultimatum and in anticipating this deadline by peremptory strike and boycott action against Petitioner [R. 562, 37]; that the delay in answering the ultimatum for union security must be considered "in the light of the history of Petitioner's relations" with this prior Union, although there was no evidence in the record and no finding thereon, and the allegation of the complaint which would raise such issue was stricken at the opening of the hearing. [R. 565; Findings R. 20.]

Jurisdiction of This Court.

The jurisdiction of this Court arises under Section 10 (e) of the National Labor Relations Act (Act of July 5, 1935, Chapter 372, 49 Stats. 453, 29 U. S. C. A. 160 as amended in 1947, 61 Stats. 136).

Section 10 (e) provides, among other things, that the judgment and decree of the Circuit Court of Appeals shall be final,

> "except that the same shall be subject to review . . . by the Supreme Court of the United States upon writ of certiorari or certification as provided in Sections 239 and 240 of the Judicial Code, as amended (U. S. C. Title 28, Sections 346 and 347)."

Cases sustaining jurisdiction are:

N. L. R. B. v. Jones & Laughlin Steel Corp., 301 U. S. 1, 81 L. Ed. 893;

Santa Cruz Fruit Packing Co. v. N. L. R. B., 303 U. S. 453, 82 L. Ed. 954;

N. L. R. B. v. Mackay Radio & Telegraph Corp., 304 U. S. 333, 82 L. Ed. 1381.

The date of the judgment and decree to be reviewed is May 17, 1949. [Vol. II, R. 578.] Rehearing was denied June 24, 1949. [Vol. II, R. 578.] Application for this writ has been made within three months after the denial of the petition for rehearing.

Statement of Questions Presented.

1. May Petitioner be ordered to bargain on the issue of union security without provision for an election in compliance with the Labor Management Relations Act, 29 U. S. C. A. 158 (a) (3). (Brief, p. 55.)

2. May an order to bargain with a Union which represents no employees of Petitioner be enforced when the National Labor Relations Board has made no finding that the loss of membership is due to the unlawful conduct of the Petitioner nor that such an order would effectuate the policies of the Act under such circumstances? (Brief, p. 1.)

3. When the Board has not considered the fact that the Union represents no employees of Petitioner, may the Court of Appeals invoke a conclusive legal presumption in order to attain the result which the Court believes the National Labor Relations Board would have reached if it had considered such fact? (Brief, p. 27.)

4. Is a general wage increase granted five months after the strike in an amount not exceeding that negotiated with the Union, a refusal to bargain, when wages had been fully negotiated and the impasse arose with respect to union security alone? (Brief, p. 42.)

5. Did the Court of Appeals improperly refuse to review the findings of the Board and go beyond those findings to devise findings of its own and base its decision thereon? (Brief, p. 31.)

6. In the light of the Union's action in requiring Petitioner to answer its ultimatum as to union security before continuing negotiations and in establishing an arbitrary deadline and then without waiting for the time set, instituting a strike and boycott action against Petitioner, and in flatly refusing to cooperate to modify the War Labor Board order and in refusing to reply to Petitioner's letter setting forth a basis for bargaining, was the Board's order supported by substantial evidence on the record considered as a whole? (Brief, p. 45.)

7. Where no unfair labor practice is found other than refusal to bargain as to union security and grant of a unilateral wage increase, may an order to bargain with respect to rates of pay, wages, hours and other conditions of employment, to take affirmative action and to cease and desist from interfering in any manner with the efforts of the Union to bargain, be enforced without modification? (Brief, p. 54.)

Statement of Grounds for Review.

1. The Court of Appeals has decided important questions of Federal law, contrary to the applicable decisions of this Court, in the following particulars:

A. In holding that there is an established "policy" of the Board to assume that any loss of union membership is the result of unfair labor practices, regardless of any other factors, that this policy should be applied as a matter of law in any and all situations by the Court of Appeals, when the Board itself has not established any such policy and has not considered the applicability of such a policy, if there be one, to the circumstances of this case.

This is contrary to the decisions of this Court in the following cases:

Franks Bros. Company v. National Labor Relations Board, 321 U. S. 702, 88 L. Ed. 1020, 1023-4;

National Labor Relations Board v. Fansteel Metallurgical Corporation, 306 U. S. 240, 83 L. Ed. 627;

National Labor Relations Board v. P. Lorillard Company, 314 U. S. 512, 86 L. Ed. 380;

National Labor Relations Board v. National Licorice Company, 104 F. 2d 655 (C. C. A. 2); modified on other grounds, 309 U. S. 350, 84 L. Ed. 799;

Securities and Exchange Commission v. Chenery Corp., 318 U. 8. 80, 87 L. Ed. 626;

Phelps Dodge Corp. v. National Labor Relations Board, 313 U. S. 177, 85 L. Ed. 1271;

Jacob Siegel Co. v. Federal Trade Commission, 327 U. S. 608, 85 L. Ed. 1271;

National Labor Relations Board v. Crompton-Highland Mills, Inc., ... U. S. ....., 93 L. Ed. 918;

National Labor Relations Board v. Newport News Company, 308 U. S. 241, 84 L. Ed. 219, 225.

B. In holding that the Board, in making its order in February, 1948, after the National Labor Relations Act had been amended and after the passage of the Administrative Procedure Act, could, nevertheless, apply the rule of the prior Act, that the rules of evidence should not be controlling and that the Board was not bound to weigh and evaluate the evidence and make its decision upon the basis of the "preponderance of the testimony" [R. 573], and without considering the effect of the new legislation.

This is contrary to the recent decision of this Court in

National Labor Relations Board v. Pittsburgh Steamship Company, ... U. S. ....., 93 L. Ed. ....., 17 Law. Week 4523.

C. In holding that the Board's unqualified order to bargain should be enforced without modification, despite the fact that no provision is made for election authorizing bargaining with respect to union security, as required by Labor Management Relations Act, 1947 (18 U. S. C. A. §158 (a) (3)), and in refusing to confine the scope of the order to the acts sought to be prohibited.

This is contrary to the decisions of this Court in

National Labor Relations Board v. Crompton-Highland Mills, Inc., ... U. S. ....., 93 L. Ed. 918;

Jacob Siegel Co. v. Federal Trade Commission (1946), 327 U. S. 608, 90 L. Ed. 888;

Morgan v. United States, 298 U. S. 468, 80 L. Ed. 1288;

National Labor Relations Board v. Fansteel Metallurgical Corporation, 306 U. S. 240, 261, 83 L. Ed. 627, 638;

Phelps-Dodge Corporation v. National Labor Relations Board, 313 U. S. 177, 85 L. Ed. 1271.

D. In holding that a wage increase which was within the limits of that negotiated by the Union and which had been agreed upon with the Union prior to the strike was, nevertheless, an independent refusal to bargain.

This is contrary to the recent holding of this Court in

National Labor Relations Act v. Crompton-Highland Mills, Inc., supra.

E. In holding that there was a refusal to bargain on the issue of union security on a record which indicates as a matter of law that Petitioner bargained in good faith and utilized legitimate bargaining tactics.

This is contrary to the decision in:

National Labor Relations Board v. Sands Manufacturing Company, 306 U. S. 332, 83 L. Ed. 682;

National Labor Relations Board v. P. Lorillard Company, 117 F. 2d 921, 923-5 (C. C. A. 6); modified on other grounds 314 U. S. 512;

National Labor Relations Board v. Express Publishing Company, 128 F. 2d 690 (C. C. A. 5).

2. The decision of the Court of Appeals is in conflict with the decisions of Courts of Appeals of other Circuits in holding that there is an established "policy" of the Board to assume that any loss of union membership is the result of unfair labor practices, regardless of any other factors, that this policy should be applied as a matter of law in any and all situations by the Court of Appeals, when the Board itself has not established any such policy and has not considered the applicability of such a policy, if there be one, to the circumstances of this case.

This is in conflict with the following decisions of Courts of Appeals of other Circuits:

National Labor Relations Board v. Inter-City Advertising Co., 154 F. 2d 244 (C. C. A. 4);

National Labor Relations Board v. Goodyear Tire & Rubber Company, 129 F. 2d 661 (C. C. A. 5);

Stewart Die Casting Corporation v. National Labor Relations Board, 114 F. 2d 849 (C. C. A. 7); cert. den. 213 U. S. 680, 85 L. Ed. 1119;

National Labor Relations Board v. American Manufacturing Company, 106 F. 2d 61 (C. C. A. 2);

National Labor Relations Board v. Maurice Eanet, ... F. 2d ..... (C. A., D. C.); 15 Labor Cases, Par. 64; 740;

National Labor Relations Board v. National Licorice Co., 104 F. 2d 655 (C. C. A. 2); modified on other grounds 309 U. S. 350, 84 L. Ed. 799;

National Labor Relations Board v. Karp Metal Products, Inc., 134 F. 2d 954 (C. C. A. 2).

3. In making findings of fact to support its decree which were not relied upon or found by the Board in framing its order, the Court of Appeals has so far departed from the accepted and usual course of judicial procedure as to call for an exercise of this Court's power of supervision.

> *National Labor Relations Board v. Crompton-Highland Mills, Inc.*, ... U. S. ....., 93 L. Ed. 918;
>
> *National Labor Relations Board v. Newport News Company*, 308 U. S. 241, 84 L. Ed. 219, 225;
>
> *Securities and Exchange Commission v. Chenery Corporation*, 318 U. S. 80, 87-88, 87 L. Ed. 626, 633.

Thus, the Court below has interpolated findings that Petitioner failed to bargain in good faith over a seven-year period with the Cosmetic Workers [R. 563-4, 565]; that Petitioner must be adjudged guilty of refusal to bargain with the Teamsters "in the light of the history of its relations with the Cosmetic Workers" [R. 565]; that even the wage increase must be viewed in the light of Respondent's continued attempts to circumvent the effect of the Teamster's certification [R. 571; Findings, R. 20]; that the Panel recommendation constitutes a part of the War Labor Board order (18 W. L. R. 582) and makes it contingent upon the continuing certification of the Cosmetic Workers [R. 565]; that the known and established policy of the Board is to enforce automatically an order to bargain, regardless of delay and despite the

Union's complete loss of membership, in any and all circumstances and even though the Board erroneously assumed that the Union continued to have a majority [R. 110] and did not exercise any discretion.

As stated, the questions presented bear upon the whole field of collective bargaining, administrative action and judicial review. The decision is so unrealistic and so extreme a departure from the decision of this Court and of the various Courts of Appeals with which it cannot be reconciled that it cannot be permitted to stand without immediately posing multitudinous questions encompassing management-union relationship and administrative review.

Some of the numerous decisions of this Court with which the decision of the Circuit Court of Appeals is in conflict have been handed down only very recently. The issues presented are of the greatest importance to every citizen and the public interest demands that this Court exercise its supervisory power, to the end that the principles involved shall remain free from doubt and confusion.

These errors are discussed in detail in Petitioner's supporting brief attached hereto.

WHEREFORE, your Petitioner prays that a Writ of Certiorari issue under the seal of this Court directed to the Court of Appeals of the United States for the Ninth Circuit, to the end that the proceedings of said Court in this cause may be reviewed and determined by this Court as provided for by the statutes of the United States; and that the judgment of said Circuit Court of Appeals be reversed; and for such further relief as the nature of the cause may require and the Court may deem proper in the premises.

Dated: July 25, 1949.

Respectfully submitted,

THE ANDREW JERGENS COMPANY,
a Corporation,
By J. STUART NEARY,
Attorney for Petitioner.

GIBSON, DUNN & CRUTCHER,
FRANK MERGENTHALER,
Of Counsel.

I HEREBY CERTIFY that I have examined the foregoing Petition and that, in my opinion, it is well-founded, and that the prayer of the Petitioner should be granted by this Court.

J. STUART NEARY,
Attorney for Petitioner.

IN THE

Supreme Court of the United States

October Term, 1949.
No. .....

THE ANDREW JERGENS COMPANY, a corporation,
Petitioner,

vs.

NATIONAL LABOR RELATIONS BOARD,
Respondent.

BRIEF IN SUPPORT OF PETITION FOR CERTIORARI.

(Pages 19 to 57.)

In support of the foregoing Petition for Certiorari, this Brief is submitted.

I.

The Enforcement of an Order to Bargain With a Union No Longer Representing Any Employees of Petitioner Should Not Be Predicated Upon the Invocation by the Court of a Presumption of Law That Petitioner Is Responsible for the Complete Loss of Membership, in the Absence of a Finding by the Board as to Responsibility and the Effect of Intervening Circumstances or That the Remedy Is Appropriate.

In response to the Petitioner's motion to adduce additional evidence, the Board conceded in its brief that "as

of January 1, 1948, the Teamsters did not contain in its membership any employees of respondent, whatsoever." The Court of Appeals recites this admission in its opinion. [R. 567.] Subsequent to the Board's order, that agency modified the appropriate unit, excluding therefrom certain watchmen and supervisory personnel who were no longer within the definition of employees in the Labor Management Relations Act, 1947. In this connection the Board stated:

> "These exclusions *do not affect the union's majority status.*" [R. 110.]

At no time did the Board consider the complete loss of membership as a factor in its decision whether an order should issue and what kind of an order would best effectuate the policies of the Act. Indeed, counsel for the Board contended that such a factor is entirely immaterial, and the Court of Appeals has accepted the argument in full.

The Court below relies upon the rulings of this Court in *Franks Bros. Company v. National Labor Relations Board,* 321 U. S. 702, 88 L. Ed. 1020, and *International Association of Machinists v. National Labor Relations Board,* 311 U. S. 72, 85 L. Ed. 50, which hold that the Board may order an employer to bargain with a union which has lost its majority status subsequent to an unfair labor practice on the theory that the Board may reasonably find that such an order will best remedy the effects of an unfair labor practice and will thereby effectuate the policies of the Act.

Petitioner submits, however, that it was error for the Court of Appeals to enforce the order herein, where the Board exercised no discretion as to the effect of inter-

vening circumstances on the propriety of its order. The decision is in flagrant disregard of the pronouncements of this Court in the following cases:

Franks Bros. Company v. National Labor Relations Board, 321 U. S. 702, 88 L. Ed. 1020;

National Labor Relations Board v. P. Lorillard Company, 314 U. S. 512, 86 L. Ed. 380;

National Labor Relations Board v. Fansteel Metallurgical Corp., 306 U. S. 240, 83 L. Ed. 627;

Securities and Exchange Commission v. Chenery Corp., 318 U. S. 80, 87 L. Ed. 626;

Phelps Dodge Corp. v. National Labor Relations Board, 313 U. S. 177, 85 L. Ed. 1271;

Jacob Siegel Company v. Federal Trade Commission, 327 U. S. 608, 90 L. Ed. 888;

National Labor Relations Board v. Crompton-Highland Mills, Inc., ... U. S. ....., 93 L. Ed. 918.

The decision of the Court of Appeals is in direct conflict with the following opinions from Courts of Appeals of other Circuits:

National Labor Relations Board v. Inter-City Advertising Company, 154 F. 2d 244 (C. C. A. 4);

National Labor Relations Board v. Goodyear Tire & Rubber, 129 F. 2d 661 (C. C. A. 5);

Stewart Die Casting Corp. v. National Labor Relations Board, 114 F. 2d 849 (C. C. A. 7); cert. denied 213 U. S. 680, 85 L. Ed. 1119;

National Labor Relations Board v. American Manufacturing Company, 106 F. 2d 61 (C. C. A. 2);

National Labor Relations Board v. National Licorice Company, 104 F. 2d 655 (C. C. A. 2); modified on other grounds 309 U. S. 350, 84 L. Ed. 799;

National Labor Relations Board v. Maurice Eanet, et al., ... F. 2d ....., 15 Labor Cases, pars. 64, 740 (C. A., D. C.).

Although the following cases are distinguishable, they are relied upon by the Court below in support of its holding. Insofar as they support the holding, they cannot be reconciled with the decisions of this Court and those of other Courts of Appeals just cited.

National Labor Relations Board v. Swift, 162 F. 2d 575 (C. C. A. 3);

National Labor Relations Board v. Norfolk Shipbuilding & Drydock Co., 172 F. 2d 813 (C. C. A. 4);

National Labor Relations Board v. Arnolt Motor Co., 173 F. 2d 597 (C. C. A. 7);

National Labor Relations Board v. Central Dispensary, etc., 145 F. 2d 852 (C. A., D. C.);

National Labor Relations Board v. Highland Park Mfg. Co., 110 F. 2d 632 (C. C. A. 4).

Had the Board taken evidence on this issue and had it been proved that for the past eighteen months the Union has represented no employees of Petitioner, and had the Board then determined upon the basis of the evidence that the loss of membership was, at least in part, the result of the purported unfair labor practice, the rule of the *Franks* case would doubtless support an order to bargain with this particular union. The significance of the decision of the

Court below that the Board *need not consider such a factor or exercise any discretion* whatsoever as to what bearing it may have on the propriety of its remedy, cannot be over-emphasized.

It cannot be gainsaid that an order to bargain with a union in which for eighteen months no employee has been a member, and whose authority to represent the employees is over three and one-half years old, has radically different consequences from an order requiring bargaining with a union whose representative status is unquestioned. It is hardly less apparent that a remedy which is appropriate where the loss of membership was occasioned by an unfair labor practice may be highly inappropriate where such loss is occasioned by independent circumstances unrelated to the conduct, lawful or unlawful, of the employer.

This is not to say that the Board must not deter employers from violating the statutory enactment. But that is not the sole consideration which should influence the Board's exercise of its remedial discretion. The Board must also protect the fundamental right, guaranteed by the statute, of employees to bargain through representatives of their own choosing.

How this administrative agency can perform its remedial function, *without considering the complete lack of any employee support* of the Union with which this Petitioner has been ordered to bargain, has not been explained. Also inexplicable is the disregard of the clear mandate of this Court, which is necessarily to be implied from the *P. Lorillard Company* case and is unmistakably made manifest in *Franks Bros. Company v. National Labor*

Relations Board, 321 U. S. 702, notwithstanding that both cases were relied upon in the opinion of the Court below.

In refusing to distinguish the *P. Lorillard* case from the *Franks* case, this Court, in the latter case, effectively differentiated the case at bar from the cases relied upon by the Court below:

> "That issuance of the order challenged by petitioner lay within the Board's discretion is settled by our holding in National Labor Relations Bd. v. P. Lorillard Co., 314 U. S. 512, 513, 86 L. Ed. 380, 382, 62 S. Ct. 397. The P. Lorillard Co. Case, argues petitioner, is distinguishable because in that case the Court pointed to the fact that, 'The Board had considered the effect of a possible shift of membership. . . .' *Id.* 513. But in this case also the Board considered the change in membership, and in addition relied in part upon the Lorillard decision to support its order. We find no possible valid distinction between this and the P. Lorillard Co. Case.
>
> "Nor is the Lorillard decision inconsistent with the earlier holding in National Labor Relations Bd. v. Fansteel Metallurgical Corp., 306 U. S. 240, 83 L. Ed. 627, 59 S. Ct. 490, 123 A. L. R. 599. In the latter case the Board's order to bargain with the union rested in part on its finding that the company should reinstate ninety-three discharged union members. The Board had not determined in that proceeding, nor did it argue in this Court, that the company should be compelled to bargain with the union if these ninety-three employees were denied reinstatement. After this Court, contrary to the Board's conclusion, held that these employees properly were denied reinstatement, *the situation was the same as if the*

> *Board had not considered the effect of the change in union membership. Cf.* National Labor Relations Bd. v. P. Lorillard Co., *supra.*" (P. 706.) (Emphasis added.)

Similarly, in other connections, this Court has made it clear that an administrative agency must consider every relevant factor bearing on the propriety of its remedy and must exercise and make known to the parties an informed discretion based upon the particular circumstances found to exist.

In *Phelps Dodge Corporation v. National Labor Relations Board,* 313 U. S. 177, the Board concluded that the employer had discriminated against union members in violation of Section 8 (3) of the Act. The employer had contended that some of the employees had obtained "substantially equivalent employment" and that the Board had no power to order reinstatement. The Board found that the employees had not obtained "substantially equivalent employment" but concluded that whether or not they had procured such other employment, the employer should be ordered to reinstate them. This Court upheld the power of the Board to reinstate such personnel, but denied enforcement of the order because the agency had not revealed upon which alternative basis the order had been framed. The confusion which exists among the lower Courts calls for application to this case by this Court of the rule that:

> "The administrative process will best be vindicated by clarity in its exercise. Since Congress has defined the authority of the Board and the procedure by which it must be asserted and has charged the federal courts with the duty of reviewing the Board's orders

(§10 (e) and (f)), it will avoid needless litigation and make for effective and expeditious enforcement of the Board's order to require the Board to disclose the basis of its order. We do not intend to enter the province that belongs to the Board, nor do we do so. All we ask of the Board is to give clear indication that it has exercised the discretion with which Congress has empowered it. This is to affirm most emphatically the authority of the Board." (P. 197.)

In *Jacob Siegel Co. v. Federal Trade Commission,* 327 U. S. 608, it was there held that where it does not appear in the record that the administrative agency had considered alternative remedies which would have cured the evil and, at the same time, would have been less harsh, the judicial function is not to pass upon the propriety of the remedy but is to remand to the Commission which must first exercise an informed judgment:

> "For the Commission seems not to have considered whether in that way the ends of the Act could be satisfied and the trade name at the same time saved. We find no indication that the Commission considered the possibility of such an accommodation. It indicated that prohibition of the use of the name was in the public interest since the cease and desist order prohibited the further use of the name. But we are left in the dark whether some change of name short of excision would in the judgment of the Commission be adequate. Yet that is the test, as the Algoma Lumber Co. and the Royal Milling Co. cases indicate. Its application involves the exercise of an informed, expert judgment." (P. 613.)

Just as in those cases, the Court in the instant case seeks to apply a stereotyped legal formula ordering Petitioner to bargain with this Union on the basis of a finding that in January, 1946, the Union was the duly certified representative of the employees.

The Board expressly assumed that at the time of the issuance of its order in 1948, the Union represented a majority of the employees. [R. 110.] No consideration was given to the possibility of a loss of majority and, of course, none to the now admitted fact that there were no employees represented by the Union, nor to the possibility that such loss could have been due solely to the unlawful strike and boycott activities.

The Court below holds that none of these alternatives need be considered at the time when the Board fashions its remedy, despite the rule that the remedy *must apply to the facts as they exist when the order takes effect.*

> *National Labor Relations Board v. Karp Metal Products, Inc.,* 134 F. 2d 954 (C. C. A. 2); (denying enforcement of the Board's order in 51 N. L. R. B. 621 [cited R. 569]).

Not only has the Court below failed to give heed to the holdings of this Court, but it has not perceived the Legislative intent which prompted the revision of Sections 10 (e) and 10 (c) to require "substantial evidence" and a "preponderance of the evidence" to support the conclusions of the Board in lieu of the "expertness" which

had been relied upon by the Board under the original Act to support orders which otherwise would not have been enforced. The statement of the managers of the amended bill on the part of the House of Representatives says, "The language also *precludes the substitution of expertness for evidence* in making decisions." (Emphasis added.) (House Report 510, 80th Congress, pp. 55-6.)

The Board's counsel may seek to support this order purely on the ground that this recipe has worked so well in the past that it will undoubtedly work in any situation notwithstanding how radically the ingredients may differ. But it thwarts the intent of Congress to utilize this "expert" knowledge to fortify an order which was issued without considering any evidence which might lead the Board to the honest conclusion that the policy was not applicable in this case.

Not only is the holding of the Court below contrary to the applicable decisions of this Court, but its opinion accentuates the irreconcilable conflict in the decisions of the lower Courts as to what kind of a finding, if any, is required to support an order to bargain with a Union which no longer represents a majority of the employees.

The Court of Appeals of the Fourth Circuit in the *Inter-City* case holds that the Board must find that the loss of membership was caused by a refusal to bargain on the part of the employer or by some other unremedied unfair labor practice.

The Court of Appeals of the Third Circuit in *National Labor Relations Board v. Swift,* 162 F. 2d 575, apparently agrees with the opinion of Judge Dobie, dissenting in the *Inter-City* case, that if the Board thinks it would best effectuate the policies of the Act, the order to bargain is sufficiently supported by a finding that the loss of membership was caused by the employer's conduct evidencing a refusal to bargain, regardless of whether the conduct itself constituted an unfair labor practice.

The decisions of the Court of Appeals of the District of Columbia, together with those of the Second, Fifth and Seventh Circuits, in the decisions cited *supra,* page 21, consistently require the Board to make a realistic and up-to-date determination of representation as a necessary finding in support of an order to bargain under factual circumstances strikingly similar to that presented by the instant record.

The Court of Appeals for the Ninth Circuit holds in its decision below, first, that the loss of membership need not be occasioned by the unremedied refusal to bargain on the part of the employer; second, that even if such a causal relationship were requisite, a legal presumption that the loss of membership was caused by the refusal to bargain may be invoked by the Court under any and all circumstances; third, that a complete loss of membership in the Union, even if the cause thereof is entirely unrelated to any conduct of the employer has no relevance to the issue of what kind of an order the Board should fashion in

order to best effectuate the policies of the Act; fourth, that, therefore, the Board need exercise no discretion in framing its remedy, even though its remedy was based upon the erroneous assumption that the Union continued to represent a majority of the employees. [R. 567-9.]

In so holding, the Court below has gone far beyond any reported decision and has mirrored more clearly than any argument the confusion which exists in the lower Federal Courts on these fundamental questions of administrative law.

It is submitted that a review of this holding by this Court is essential, in order that the applicability of the doctrine of the *P. Lorillard, Phelps Dodge,* and other cases relied upon by Petitioner, to the circumstances presented by the record herein, may be clarified. Otherwise, the Board may assume that it is warranted in stereotyping a remedy to punish employers who have refused to bargain, without regard to the effect of such a remedy on the rights of employees to bargain through representatives of their own choosing, and as in this case, to insist that its possible effect on such rights need not enter into their judgment processes.

II.

The Court Failed to Determine the Applicability of the Amendments of the Labor Management Relations Act of 1947 and Invaded the Exclusive Province of the Board by Making Independent Findings of Its Own, in Considering Facts Beyond the Record, and Supporting the Decree of Enforcement on Grounds Not Considered by the Board.

A. The Court Refused to Determine the Applicability of the Amendments of the Labor Management Relations Act of 1947 and the Effect of Such Amendments on the Scope of the Court's Review of the Board's Order.

Prior to the Board's decision, the far-reaching amendments affecting the rules of evidence and scope of judicial review of the Labor Management Relations Act of 1947 became effective. Section 10 (c) of the Act now provides that the Board's findings must be supported by "substantial evidence on the record considered as a whole." (29 U. S. C. A. 160 (e).) Prior to the amendment the Act simply required that the findings be supported by evidence.

The amendments also provide in Section 10 (c) a new requirement that the Board must find in accordance with the "preponderance" of the testimony.

One instance in which the Board did not find in accordance with the preponderance of the testimony, and of the fact that the Court of Appeals did not consider whether the findings were supported by substantial evidence "on the record considered as a whole," is the finding that

Petitioner's representatives said they had no authority to *negotiate* with respect to union security. [R. 36.] This finding is based solely on the testimony of John Stevenson [R. 288] which is in direct conflict with the testimony of every other witness in the case, including the testimony of the Union's business representative, Davis, and in conflict with the actual facts disclosed by the record itself that union security was, in fact, negotiated. [R. 25-39.]

Another example of the Court's failure to determine the applicability of the Labor Management Relations Act is the reference in the Court's decision [R. 565] to "substantial evidence" and not substantial evidence "on the record considered as a whole."

The fact that the Court refused to decide the applicability of the amendments is revealed in its decision [R. 573] wherein the Court stated that while Petitioner had made various objections to the admission of evidence, Section 10 (b) of the Act, as it provided at the time of the hearing, made inapplicable the strict rules of evidence, but that the rulings made on evidence would have been correct even if the rules of evidence were applicable. At the time of the Board's decision the 1947 amendments had made the rules of evidence applicable, and the portion of the decision referred to shows that the Court did not consider whether the old Act or the amended Act was controlling.

This Court recently reviewed another instance in which the Court of Appeals refused to decide this question and remanded the case to the Court of Appeals for a decision on the applicability of those rules. *Pittsburgh Steamship*

Company v. National Labor Relations Board, ... U. S. ....., ... L. Ed. ....., 17 L. W. 4523. This Court stated:

> "Without doubting the existence here of evidence substantial enough under the Wagner Act, Consolidated Edison Co. v. Labor Board, 305 U. S. 197, 229, to warrant the Board's findings, we are not certain whether that standard controls this case. For questions have arisen whether the Administrative Procedure Act, 60 Stat. 237, 5 U. S. C. §1001 *et seq.*, and the Taft-Hartley Act, 71 Stat. 136, 29 U. S. C. Supp. I, §141 *et seq.*, enacted between issuance of the Board's order and the Court of Appeals' decision, are applicable to and if applicable in any way affect Board procedures and the scope of judicial review of Board orders. The applicability and possible effect of either or both of these statutes apparently were not dealt with by the Court of Appeals, which neither discussed the statutes nor cited cases discussing them; the statutes and their impact have not been briefed with any elaboration before this Court. These questions should be considered in the first instance by the Court of Appeals." (17 Law Week 4524, decided June 20, 1949.)

It is apparent from the decision of this Court in *Pittsburgh Steamship Company v. National Labor Relations Board, supra,* that the scope of review with respect to "substantial" evidence on the record "as a whole" may impose an entirely different requirement than that imposed by the "evidence" requirements of the original Wagner Act. The same, of course, is even more clearly true in the case of the requirement of the amended Act that the Board decide in accordance with the "preponderance" of the testimony.

The effect and applicability of these provisions the Court of Appeals did not decide, despite the fact that Petitioner urged upon the Court of Appeals that those amendments were applicable and that the findings of the Board were insufficient when put to such standard.

B. The Court of Appeals Has Exceeded Its Function of Judicial Review by Making Independent Findings of Its Own, by Considering Facts Beyond the Record, and by Supporting the Decree of Enforcement on Grounds Which Were Not Considered by the Board, Thereby Invading the Province Left by Congress for the Exclusive Jurisdiction of the Board.

In its decision the Court of Appeals in at least six different instances has invaded the province of the Board, and exceeded its own function, by making independent findings of fact of its own, by considering "facts" not appearing of record but which the Court probably acquired from statements in the Board's brief, and in attempting to justify the Board's order on grounds and legal theories which the Board itself did not use to justify its order. The Court, therefore, has not confined itself to reviewing the sufficiency of the Board's findings and conclusions, but has added to those findings and conclusions in clear usurpation of the function of the Board and in violation of the intent of the Act.

The Board's findings appear in the record at pages 21-54, 103-110.

One of the instances in which the Court assumes facts which are not in the record, but which are material to its decision, are the references to the Soap and Cosmetic Workers' Union. The entire 16 lines contained in the

paragraph beginning at R. 563 are not contained any where in the record and certainly were not in the findings of the Board. Yet the "history" there related of Petitioner's relations with the Soap and Cosmetic Workers' Union is a finding which the Court considers material as is evidenced by the Court's statement that Petitioner was "stalling . . . *especially in the light of the history of its relations with the Cosmetic Workers.*" [R. 565.] (Italics added.) The Court found that Petitioner's "history" with respect to the Cosmetic Workers was one of dereliction, a finding which even the Board did not make. It is interesting here to note that the original complaint contained a paragraph dealing with the relations of Petitioner and the Soap and Cosmetic Workers, which was *stricken on motion of Petitioner.* [Findings, R. 20.]

Again, the Court went beyond the record in its assumption of "Respondent's continued attempts to circumvent the effect of the Teamsters' certification" [R. 571], which the Court states furnishes additional evidence of Petitioner's bad faith. While this may be an inadvertent statement on the part of the Court, it is a finding authored entirely by the Court, and there is no evidence in the record whatsoever relating to any "continued" attempt to circumvent the Teamsters' certification. The Board made no finding whatsoever, nor is there any fact in the record, with respect to such conduct on Petitioner's part.

While it is clear without citation of authority that the Court, or for that matter even a trier of fact, may not consider facts outside the record, this Court has expressly stated that such practices are condemned by Section 10 (e) of the Act.

In *National Labor Relations Board v. Newport News Company,* 308 U. S. 241, 249-50, 84 L. Ed. 219, 225, the Court of Appeals had considered the "facts" brought to its attention in a brief, which is evidently the source of the lower Court's "findings" in the instant case. In holding this to be error, the Court stated:

> "The court below, in its opinion, states it was advised in a brief after the hearing in that court, that the plan had been amended by striking out the provisions in question. It concludes, therefore, that their previous existence is immaterial. The statute expressly deprives the reviewing court of power to consider facts thus brought to its attention. The case must be heard on the record as certified by the Board. The appropriate procedure to add facts to the record as certified is prescribed in §10 (e) of the Act."

In other instances the Court of Appeals not only considered matters outside the record, but made findings of its own independent of any findings of the Board.

At R. 565 the Court's decision stated that Petitioner's delay in sending the letter of February 15, 1946, may be attributed to "stalling tactics" by the Petitioner. The Court uses this finding that Petitioner "stalled" to support the Board's conclusion that Petitioner had violated Section 8 (5) of the Act in not bargaining in good faith. But the Board did *not* make a finding that Petitioner's delay with reference to the letter was unreasonable or that such

delay amounted to "stalling tactics" which was evidence of bad faith. In this instance, therefore, the Court of Appeals has clearly inserted findings of its own, and drawn its own inferences and conclusions from the evidence and Petitioner's conduct, a function clearly left solely to the Board. Furthermore, the Court uses this finding of its own to support the Board's conclusions.

Even as a matter of law, the Court could not state that Petitioner's conduct constituted "stalling" because the Board itself has never held that a delay for any period in and of itself constituted "stalling" and evidence of bad faith. For example, in *Norwood Sash and Door Manufacturing Company,* 42 N. L. R. B. 678, the Board held that the employer's delay of two months so that it might be advised by its labor relations counsel did not amount to "stalling" and was not unreasonable even though the employer had no serious question upon which it needed advice.

In the Matter of Out-West Broadcasting Company, 40 N. L. R. B. 1367, the Board held that a period of five months' delay, during which time the employer cancelled meeting after meeting, was not "stalling tactics" and that the employer's delay of two months in submitting promised counter-proposals was justified under the circumstances.

A similar holding by the Board is *Matter of American Laundry Machine Company,* 76 N. L. R. B. 981.

Since the Court has made a finding which the Board itself did not make, and since it clearly appears at R. 565,

571, that the Court used the finding to support the Board's order, it cannot be stated that the Court without such interpolated findings, would have enforced the Board's order.

The Court of Appeals has further departed from the findings and conclusions of the Board in its consideration of the unilateral wage increase, which the Court of Appeals justifies as an unfair labor practice on the theory that since the strike involved was an unfair labor practice strike, such unilateral action constituted a violation of Section 8 (5) of the Act. [R. 571.] The Board, however, found that the wage increase was an *"independent"* unfair practice. [R. 110.] The Board stated this as a conclusion, without revealing its basis for such determination or justifying it in any way.

The Court of Appeals has itself suggested a ground upon which to justify that conclusion, but it cannot be said that this was the ground upon which the Board based its conclusion. It would seem not to be the ground of the Board's conclusion, inasmuch as the Board states that the wage increase was an *"independent"* refusal to bargain. [R. 110.]

In *Phelps Dodge Corporation v. National Labor Relations Board,* 313 U. S. 177, 85 L. Ed. 1271, this Court held that it is necessary for the Board to reveal the basis of its order, see quotation of this case, *supra,* pp. 25-26.

The Board's conclusion with respect to the unilateral wage increase, therefore, would not seem to be sufficiently

supported since the Board does no more than conclude that such unilateral action was an unfair labor practice. However, it is for the Board to supply the basis of such conclusion and not the Court of Appeals.

Other instances in which the Court of Appeals has made findings of its own are its statements, with respect to the War Labor Board order, to the effect that Petitioner gave little weight to the force and effect of such order [R. 566], and in supporting the Board's finding that Petitioner was not justified in discussing the War Labor Board order by finding that such order was inapplicable by its own terms [R. 565], while the Board had held that such order was a nullity and devoid of legal effect as it carried no punitive provision. [R. 43-44.]

Probably the most extreme instance in which the Court of Appeals has itself devised grounds to support the Board's order is the rule laid down by the Court of Appeals that it is to be assumed as a matter of law that the loss of majority by the Teamsters in this case was due to Petitioner's conduct. In short, the Court of Appeals has devised a conclusive *legal presumption* to take the place of a finding by the Board. Whether the Board would apply such presumption is not here material, but in any event if such presumption is to be used as a ground to support the order, it is for the Board to apply it and not the Court.

The opinion of this Court in *National Labor Relations Boord v. Newport News Company, supra,* page 36, suffi-

ciently supports Petitioner's contention here that the Court of Appeals went beyond the record and that such conduct is erroneous.

This Court has also announced the principles which the Court of Appeals has violated in making findings of its own and in presenting grounds to support the order which the Board itself did not consider.

In *Securities Exchange Commission v. Chenery Corporation,* 318 U. S. 80, 87-88, 87 L. Ed. 626, 633, this Court stated:

> "Since the decision of the Commission was explicitly based upon the applicability of principles of equity announced by courts, its validity must likewise be judged on that basis. The grounds upon which an administrative order must be judged are those upon which the record discloses that its action was based.
> * * *
>
> "If an order is valid only as a determination of policy or judgment which the agency alone is authorized to make and which it has not made, a judicial judgment cannot be made to do service for an administrative judgment. For purposes of affirming no less than reversing its orders, an appellate court cannot intrude upon the domain which Congress has exclusively entrusted to an administrative agency."

These cases and the *Siegel* and *Phelps Dodge* cases discussed *supra* (pp. 25-26) are conclusive that the order of the Board in this case is not supported by sufficient find-

ings, either with respect to the conclusion that Petitioner has committed an unfair labor practice, or as to the effect of complete loss of membership in the Union with which Petitioner is ordered to bargain. These cases likewise are conclusive that the action of the Court of Appeals in making findings of its own and supplying grounds to support the Board's decision, has exceeded the function of judicial review. The importance of the questions raised by such procedure is self-evident. Indeed, such questions go to the very root of the principles of division of authority between administrative and judicial bodies, and involve essential problems with respect to the requisites of fair hearing, due process and judicial review.

III.

The Findings of the Board Are Insufficient to Support Its Conclusions That Petitioner Was Guilty of Unfair Labor Practices, and No Review Has Been Afforded Petitioner of the Sufficiency of the Findings to Support the Decision.

There are no sufficient findings to support the Board's conclusion with respect to the unilateral wage increase; its holding that the Union's arbitrary action did not affect Petitioner's duty under the Act; and its rejection of Petitioner's position with respect to the War Labor Board order as being put forth in bad faith. The review afforded by the Court of Appeals was not confined to considering the sufficiency of the findings of the Board to support the order, but, on the contrary, as has been set forth above, the Court of Appeals interpolated findings of its own which it added to those of the Board to sustain the order.

A. The Conclusion That the Wage Increase of July, 1946, Was an Unfair Labor Practice Is Not Supported by Any Finding of the Board and Is Contrary to the Decisions of This Court.

During the course of the strike, Petitioner granted a 15¢ general wage increase. [R. 38-39.] At the time of giving the increase, the Teamsters' Union was not consulted with respect thereto. The Board, therefore, concluded, without in any way revealing the basis of such conclusion, that this increase constituted an independent refusal to bargain. [R. 110.]

As was held by this Court in *Phelps Dodge Corporation v. National Labor Relations Board,* 313 U. S. 177, 85 L.

Ed. 1271 (see quotation, *supra,* pp. 25-26), the Board in making its orders must disclose the basis upon which it reached its conclusions. This the Board clearly did not do. The Court of Appeals supplied the basis for such conclusion with respect to the wage increase by announcing the principle that while the employer may unilaterally grant a wage increase after an impasse in negotiations is reached, such right is only afforded the employer where the Union is guilty of having broken off negotiations. [R. 571.]

The record is clear, and, in fact, it is admitted by the Board, that the parties had negotiated with respect to wages and were in complete agreement with respect thereto. The Board's brief filed in the Court of Appeals stated (p. 25) that it was admitted that "the Teamsters and the Respondent reached substantial agreement on all issues except that of union security." The Union stated that whatever increase was put into effect on a national scale would be satisfactory. [Findings, R. 26, 30, 36, 105, 109; Decision, R. 570.]

No agreement could be reached with respect to when the wage increase could be put into effect and the Union summarily broke off negotiations before that subject could be completed. [R. 36, 105-106.]

The Board's decision states that the increase constituted an *independent* refusal to bargain. [R. 110.] The Court of Appeals held that the increase constituted a refusal to bargain upon the basis that Petitioner was guilty of a refusal to bargain on the *union security* provision on January 17, 1946. [R. 571.]

With respect to wages, there is no denial that Petitioner bargained in good faith. Further, there is no

denial that the Teamsters would not consider the exact terms of the wage increase or when it would be put into effect or execute any agreement with respect thereto. Further, the increase granted in July, 1946, was in an amount within the limits of that discussed previously on January 16, 1946, with the Teamsters. [R. 30.]

Inasmuch as the Board found the increase to be an "independent" refusal to bargain, the basis set forth by the Court, even if correct, would not support its order. However, in view of the recent decision of this Court in *National Labor Relations Board v. Crompton-Highland Mills, Inc.*, 93 L. Ed. 918, the ruling of the Court of Appeals is clearly erroneous. In that case the unilateral wage increase was held by this Court to be improperly granted inasmuch as it exceeded the wage increase which previously had been negotiated with the Union. The decision of this Court specifically differentiates the present case and recognizes that the increase given here was not a refusal to bargain (p. 922):

> *"We do not here have a unilateral grant of an increase in pay made by an employer after the same proposal has been made by the employer in the course of collective bargaining but has been left unaccepted or even rejected in those negotiations.* Such a grant might well carry no disparagement of the collective bargaining proceedings. Instead of being regarded as an unfair labor practice, it might be welcomed by the bargaining representative, without prejudice to the rest of the negotiations." (Emphasis added.)

No reason is perceived why the wage increase granted in the instant case could carry any disparagement of the collective bargaining proceedings, nor can it be perceived

how such an increase would not be welcomed by the bargaining representative without prejudice to the rest of the negotiation inasmuch as the Union had already agreed upon the wage increase and had only refused to execute a contract with reference thereto.

The decision of this Court in *National Labor Relations Board v. Crompton-Highland Mills, Inc., supra,* has set forth that a unilateral increase under the circumstances of the present case was not a refusal to bargain. In this case wages had been negotiated in good faith with the Teamsters; there was virtual agreement on wages and an impasse was reached on another point which had the collateral effect of preventing the execution of the contract with respect to wages; and the increase granted was within the limits negotiated. The decision of the Court below cannot be reconciled with the rules announced by this Court in the *Crompton-Highland Mills, Inc.* case.

B. The Union Was Guilty of Arbitrary Action of Such Nature That It Cannot Be Said That Petitioner Has Failed in Its Duty.

The Board finds that "the Teamsters were insistent on some form of security" [R. 36, 105], and the Circuit Court states, "The Teamsters were particularly anxious to obtain some union security provision in the contract." [R. 562.]

The Board's brief states: "There was nothing of substance left to negotiate except union security. . . . *The Teamsters were unwilling to sign an agreement without a union security clause.*" (P. 29.)

Admittedly, the Union, instead of electing to negotiate a contract, took an arbitrary position and pinned every-

thing on union security. At no time did the Union ever offer to discuss whether a contract would be entered into *upon terms other than union security.* The record and findings are directly to the contrary and the decision of the Court is to the contrary. The Union would not discuss a contract without union security. The union security demand was the ultimatum with which negotiations began and with which they concluded. The Union entered into the negotiations, imposed this ultimatum, and then placed an arbitrary deadline for a reply, and anticipating this deadline, put into effect a strike and boycott to destroy Petitioner's business.

Petitioner did not have to accept the Union's demand that the parties agree on union security first, but Petitioner did attempt to negotiate this issue. A glance at the Report [R. 24 to 39] shows that *every* witness testified that union security was discussed to the subordination of all other clauses in the contract.

The Court, in holding that under this set of facts found by the Board itself Petitioner has been guilty of refusal to bargain, puts a premium upon arbitrary and irresponsible Union conduct and leadership.

Three pages of the opinion of the Circuit Court [R. 562-5] are devoted to a discussion of the letter written by Respondent's attorney on Friday, February 15th, and received by the Union *after* it had put its strike and boycott into effect, in an all-out effort to ruin Petitioner.

This precipitate strike action cannot be justified by the wording of the letter of February 15th which was still in the mails. It was the Union that terminated negotiations by its suddenly instituted coercive measures. The Union

ignored the letter upon the ground that the Petitioner's position as to the War Labor Board order was an "impossible situation" and that there would be no further negotiations. [R. 326, 334-5, 346, 348.]

It is significant that the Court has not found *when* the refusal to bargain occurred, nor could the Board find this assumed fact. It is inconceivable that any one present at the meeting of January 17th could have considered that Petitioner's representatives refused to bargain on that date. If there was no refusal on January 17th, when did such refusal occur? Certainly not by the terms of a letter received by the Union after it had taken its irretrievable step to terminate negotiations and entered upon its all-out campaign to put Petitioner out of business.

This holding of the Court of Appeals is, furthermore, in conflict with the decision of the Fifth Circuit in *National Labor Relations Board v. Express Publishing Company,* 128 F. 2d 690, the second headnote of which case states:

> "Evidence failed to establish that newspaper publisher was in 'contempt' as refusing to comply with order of Circuit Court of Appeals enforcing order of National Labor Relations Board, which directed publisher to cease and desist from refusing to bargain collectively with guild as exclusive representative of editorial employees, where it appeared that negotiations were broken off abruptly by guild with intention of compelling acceptance of its proposed contract by coercion."

As stated in *National Labor Relations Board v. P. Lorillard Co.* 117 2d 921, 923-5 (C. C. A. 6), modified on other grounds 314 U. S. 512, 86 L. Ed. 380:

> "The Board is not authorized, by statute or court decision, to shape or control the course of the negotiations * * * so long as the employer bargains collectively, in accordance with the statute." (p. 923), * * *
>
> "But if the employer is free to contract or to refuse to contract at will, he is likewise free frankly to state the terms upon which he may yield and those upon which he will not yield." (p. 924), * * *
>
> "The sincerity of the employer's effort in negotiating with a labor organization, under the statute, is to be tested by the length of time involved in the negotiations and the persistence with which the employer offers opportunity for agreement." (p. 924).

In *National Labor Relations Board v. Sands Mfg. Co.*, 306 U. S. 332, 83 L. Ed. 682, the Union Committee in a meeting with the Company on August 21, was "adamant" that the Company could close its entire plant if it chose, but could not operate the machine shop in accordance with its interpretation of the contract. On the next day the factory was closed. The Board found that the Company was under obligation to send for the Committee and "again reason with its members" or postpone closing the plant. This Court held:

> "We think it was under no obligation to do any of these things. There is no suggestion that there was a refusal to bargain on August 21st. There could be, therefore, no duty on either side to enter into further negotiations for collective bargaining in the absence of a request therefor by the employees." * * *

"As the respondent had lawfully secured others to fill the places of the former employees and recognized a new union, which, so far as appears, represented a majority of its employees, the old union and its shop committee were no longer in a position on September 4th to demand collective bargaining on behalf of the company's employees." 306 U. S. 343-344.

In this case, as in those cited, the Union and employer could not reach agreement on a contract term and the Union attempted, as is the case here, to coerce the employer into the agreement by summarily breaking off negotiations and instituting strike activity of a serious nature.

The Board found that the cause of disagreement between Union and Petitioner was the effect to be attributed to the War Labor Board order, yet the Board *expressly refused to find whether the Union had refused to cooperate* with Petitioner in clarifying the effect of the order. [R. 108.] This is tantamount to a holding by the Board that arbitrary action by a Union is not relevant in judging the conduct of the employer affected by such action.

C. The Board and the Court Have Refused to Consider Petitioner's Position With Respect to the War Labor Board Order, and the Finding That the Position of Petitioner With Respect to That Order Was Taken in Bad Faith Does Not Have the Support of a Preponderance, or Any, of the Evidence.

Petitioner's position with respect to the effect of the War Labor Board order has not had any real consideration by the Board or the Court of Appeals as both tribunals have summarily dismissed Petitioner's position

with respect thereto as being obviously and palpably unreasonable and in bad faith.

The fact was that the War Labor Board (18 W. L. R. 582) had issued an order that Petitioner grant the Soap and Cosmetic Workers' Union a 5¢ retroactive increase and a maintenance of membership clause. That order provided that Petitioner was not to grant either without granting both.

The employees, the Teamsters, and the Petitioner in January, 1946, desired this 5¢ retroactive increase to be paid and there was no controversy thereon. The further increase which was there virtually agreed upon in January, 1946, was an increase applicable to the future only and somewhere in the region of 15¢ per hour. It should also be pointed out that this 15¢ wage increase was eventually put into effect in July, 1946, by Petitioner, and this increase was authorized by a general order granting general authority for increases of approximately 18¢ per hour. See:

> I Labor Arbitration Reports CXL; II Labor Arbitration Reports XXIX.

In view of the provisions of the War Labor Board order which made its two directives mutually dependent upon each other, Petitioner was in doubt as to its position if it granted either the 5¢ retroactive increase alone or if it granted a union security provision to any one other than the Soap and Cosmetic Workers' Union. It was feared that if the union security provision was granted to the Teamsters, which, of course, would preclude a granting of any such clause to another union, that Petitioner would not thereafter be able to give the 5¢ retroactive increase which was desired by all parties.

Executive Order 9250, Title III, Section 4 (7 F. R. 7871) provides that:

> "Any wage or salary payment made in contravention thereof shall be disregarded by the Executive Departments and other governmental agencies in determining the cost of expenses of any employer for the purpose of any law or regulation * * *"

The effect of the quoted provision was to exclude such wage payments from being considered as an item of cost under the Emergency Price Control Act and for the purpose of calculating deductions under the revenue laws of the United States and also for the purpose of determining cost under any government contract. It was not until November 12, 1946, by Executive Order 9801 (11 F. R. 13435) that controls over wages and salaries under the Wage Stabilization Act of 1942 were removed.

It is not unreasonable in the face of such penalties to insist on strict observance of such an order where there is any slight doubt whatsoever as to its effect.

The question here, and the question before the Board and the Court of Appeals, is not, and was not, the legal effect of the War Labor Board order. The position taken by Petitioner was that it was in some doubt as to the effect of the order, and that in view of the penalties attached to it, it would be unable to take any action which might in any way constitute a breach of the order.

The Court of Appeals in its decision goes to some length to set out that the War Labor Board order was not effective in January of 1946. By incorporating the Panel Report into the War Labor Board's decision which that Board did not do, it reaches the conclusion that the Board's order was self-dissolving [R. 565.] That was

a ground upon which the Board did not base its decision, and it was a disposition which was not responsive to Petitioner's position. In January of 1946 there was no directive or decision determining the effectiveness of the War Labor Board order. See the decision of this Court discussing the penalties of such order in *Algoma Plywood & Veneer Company v. Wisconsin E. R. B.* (March, 1949), 93 L. Ed. 541, 551.

Petitioner repeatedly urged upon the Teamsters that since all parties were agreeable to the 5¢ retroactive increase, they should jointly petition for a modification of the War Labor Board order to permit the granting of the 5¢ retroactive increase without the condition inserted in that order of giving a maintenance of membership clause to the Soap and Cosmetic Workers. The position of the Union with respect to such request of Petitioner was that it considered the War Labor Board order a nullity and would have nothing to do with it. [R. 28.]

Stevenson testified on behalf of the Teamsters that he had offered to join with the Petitioner to "clarify the atmosphere with respect to the War Labor Board order". [R. 106.] There was then a conflict in the testimony as to the diligence of both the Teamsters and the Petitioner in seeking a clarification of the effect of the War Labor Board order.

The Board clearly states in its decision that Petitioner in advancing the War Labor Board order was not bargaining in good faith. Yet, the Board in so finding, did not consider the testimony to the effect that Petitioner had repeatedly urged the Union to join with it in clarifying the effect of the order, nor did the Board resolve the conflict as to whether the Union was ever willing to join

in an application for clarification. In fact, footnote "6" of the Board's decision states that since the War Labor Board order was not a legal bar, "It is, therefore, *unnecessary to resolve the evidentiary conflict as to whether or not the Union failed to seek withdrawal of the directive order in question.*" [R. 108.]

We have, therefore, a case in which the Petitioner put forth its doubt with respect to the effect of the War Labor Board order as precluding it from being able to make a union security contract with the Teamsters, and which the Board found to be put forth in bad faith. Yet, by the express admission of the Board, the Board made such finding without considering whether the Petitioner unsuccessfully attempted, as Petitioner earnestly urged, to have the Union join with it in clarifying the effect of the order. It is impossible to understand how the Board could reasonably find Petitioner was in bad faith while refusing to consider such evidence. It was, of course, the uniform practice of the War Labor Board to require joint applications on such matters.

The letter which Petitioner sent the Teamsters on February 15, 1946, is implicit to the effect that Petitioner was willing to seek clarification of the order if the Union would join with it. This letter stated:

> "The Company finds itself unable to come to a decision upon this point [union security] until the above mentioned order of the War Labor Board is revoked or disposed of in some other manner so as not to cause the Company embarrassment in the future."

IV.

The Instant Order Should Be Denied Enforcement Unless Modified to Conform With the Findings of the Board and Unless Qualified by the Provisions of Section 8 (a) (3) of the Labor Management Relations Act of 1947.

Neither the Board nor the Court below has contended that the evidence adduced at the hearing affords the basis for an inference that Petitioner has shown a lack of good faith or a lack of consistency with the principle of collective bargaining, except for refusing to agree or discuss a union security clause and, later, granting a unilateral wage increase. [R 36, 562.] Yet the order which the Court of Appeals would enforce requires Petitioner to bargain with the Union with respect to rates of pay, wages, hours of employment and other conditions of employment; to post notices that it will comply with such requirements; and to cease and desist from interfering in any manner with the efforts of the Union to bargain collectively with it.

This Court has repeatedly and recently held that an order of such breadth may not be enforced under such circumstances.

> *National Labor Relations Board v. Crompton-Highland Mills, Inc.*, ... U. S. ....., 93 L. Ed. 918;
>
> *National Labor Relations Board v. Express Publishing Company*, 312 U. S. 426, 85 L. Ed. 930.

Furthermore, the unqualified order to bargain with respect to union security ignores the statutory provisions of the Act as amended,* requiring an election authorizing the Union to negotiate on that subject before the employer has any obligation to consider it as an appropriate topic for collective bargaining. Particularly in view of the admitted fact that the Union represents no employees of Petitioner, it is futile to protest, as does the Court below in accord with the counsel for the Board [R. 566], that such was the intent of the Board when the order was issued, more than eight months after Section 8 (a) (3) was modified, and the order has been allowed to stand without modification over Petitioner's objection. Obviously, if the Board has a particular intent or reservation or condition in mind, it should make such reservation or condition in express terms so that Petitioner will be protected and the rights and obligations of the parties may be enforced in accordance with law.

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*"(3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization: Provided, That nothing in this Act (§§141 to 197 of this title), or in any other statute of the United States, shall preclude an employer from making an agreement with a labor organization (not established, maintained, or assisted by any action defined in section 8(a) of this Act (this subsection) as an unfair labor practice) to require as a condition of employment membership therein on or after the thirtieth day following the beginning of such employment or the effective date of such agreement, whichever is the later, (i) if such labor organization is the representative of the employees as provided in section 9(a) (§159(a) of this title), in the appropriate collective-bargaining unit covered by such agreement when made; and (ii) if, following the most recent election held as provided in section 9(e) (§159(e) of this title) the Board shall have certified that at least a majority of the employees eligible to vote in such election have voted to authorize such labor organization to make such an agreement." 29 U. S. C. A. 158(a)(3).

Conclusion.

The enormity of the error of the decision of the Court of Appeals arises from the fact that the original Board's charge was utterly baseless, the Board's decision completely untenable. It could not be supported in the Court of Appeals without disregarding the requirements of statute and the principles of due process and the proper functions of judicial review.

The decision below is such a radical departure from all prior decisions and such a drastic advance beyond even the contentions of the Board itself in the many particulars noted as to call for the exercise of the supervisory power of this Court. The decision erases all established landmarks of good faith collective bargaining, administrative procedure and judicial review. It is impossible to overstate the serious and far-reaching consequences of such a decision if permitted to stand. The Court has abdicated its reviewing function in accepting without question the finding of the Board and its rulings and has exceeded that function in manufacturing findings of its own to supplement the findings of the Board. It has obviously misinterpreted controlling decisions of this Court, and disregarded and failed to notice other recent controlling decisions covering all issues presented, and has equally disregarded the statutory requirements. The decision constitutes nothing short of judicial legislation.

For the reasons herein set forth, Petitioner submits that the decision of the Court of Appeals is not only in

conflict with the prior decisions of this Court and of other Courts of Appeal and with the overwhelming weight of authority, but that the questions involved are of the greatest national importance and should be settled by decision of this Court.

Dated: July 27, 1949.

Respectfully submitted,

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In the Supreme Court of the United States

OCTOBER TERM, 1949

No. 225

THE ANDREW JERGENS COMPANY, PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

OPINIONS BELOW

The opinion of the court below (R. 561-573) is reported at 175 F. 2d 130. The findings of fact, conclusions of law, and order of the National Labor Relations Board (R. 103-114) are reported in 76 N. L. R. B. 363.

JURISDICTION

The decree of the court below (R. 574-578) was entered on May 17, 1949. The Company's petition

for rehearing was denied on June 24, 1949 (R. 578). The petition for a writ of certiorari was filed on July 30, 1949. The jurisdiction of this Court is invoked under Section 10 (e) of the National Labor Relations Act, as amended, and under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether, where the employer seeks to have a case remanded to the Board to take evidence that the union with which the Board has ordered it to bargain no longer retains as members a majority of the employees in the unit, the court may, without remanding the case, itself apply the Board's known and established policy of attributing such a loss of majority to the employer's unfair labor practices and enforce the Board's order.

2. Whether the Board's findings of fact are supported by substantial evidence on the record as a whole.

The following additional questions are urged by the Company, but we believe that they are not presented by the record in this case:

3. Whether the court below improperly refused to review the findings of the Board, and went beyond those findings to devise findings of its own and base its decision thereon.

4. Whether a unilateral grant of a wage increase constitutes an independent refusal to bargain within the meaning of Section 8 (5) of the Act,

where the wage increase was within the limits of that previously negotiated and the impasse arose with respect to union security only.

5. Whether a Board order requiring the Company to bargain with a union, where the Company was found to have refused to bargain in good faith on the issue of union security, may be enforced without a specific provision that the Company is required to bargain with respect to union security only in the event that the Union shall have won a union-security referendum as provided for in Section 8 (a) (3) of the Act, as amended.

6. Whether a Board order, requiring the Company to cease from refusing to bargain collectively, from unilaterally changing wages, and from in any other manner interfering with the efforts of the union to bargain collectively, and, as affirmative action, to bargain collectively with the union upon request and to post appropriate notices, may be enforced without modification, where the Board found that the Company refused to bargain collectively in good faith, in violation of Section 8 (5) of the Act, and that the Company's unilateral grant of a wage increase constituted an independent refusal to bargain within the meaning of Section 8 (5).

STATUTE INVOLVED

The pertinent provisions of the National Labor Relations Act (49 Stat. 449, 29 U. S. C. 151, *et seq.*), and of the Labor Management Relations Act of 1947 (61 Stat. 136, 29 U. S. C., Supp. II,

141, *et seq.*), are set forth in the Appendix, *infra*, pp. 25-33.

STATEMENT

Upon the usual proceedings under Section 10 of the National Labor Relations Act, as amended, the Board, on February 26, 1948, issued its findings of fact, conclusions of law, and order (R. 103-114). On March 16, 1948, the Board issued an order correcting its decision and order (R. 115). The pertinent facts, as found by the Board, may be summarized as follows:[1]

The Company, an Ohio corporation, with its principal place of business at Cincinnati, owns and operates a plant at Burbank, California, where it is engaged in the manufacture and sale of toilet articles, cosmetics, and related products (R. 21; 524, 525). On January 4, 1946, after an election held pursuant to the Board's direction of election, the General Warehousemen's Union, Local 598, of the Teamsters, Chauffeurs, Warehousemen, and Helpers, A. F. L., herein called the Teamsters (referred to by the Company in its petition as the Union) was certified by the Board as the collective bargaining representative of the production and maintenance employees of the Company at its Burbank plant (R. 23; 17, 18).

By letter dated January 9, 1946, the Teamsters requested the Company to begin immediate negotiations for a contract (R. 24; 171, 172, 467). A meet-

[1] In the following statement, the references preceding the semi-colon are to the Board's findings; the references following the semi-colon are to the supporting evidence.

ing was held on January 17, 1946, and was attended by Attorney Stevenson and Business Representative Davis for the Teamsters and by Attorneys Mergenthaler and Powers and certain plant officials for the Company (R. 105; 172, 173, 264, 265, 418, 419). This was the only formal meeting held between the Teamsters and the Company (R. 24; 301).

Negotiations were conducted by discussing and comparing the standard contract used by the Teamsters with a contract which the Company had negotiated in 1942 with an earlier union, the Soap and Cosmetic Workers Union, Local 21,361, A.F.L., but later refused to execute on the ground that the Cosmetic Workers did not represent a majority of its employees (R. 24, 25, 107; 174-175, 265-267, 385-392, 466, 468-474). The Teamsters and the Company negotiated on seniority, the standard day, the standard week, the shift rate, holidays, vacations, grievance procedures, and other issues; and many of the provisions in the Teamsters' contract were agreed to as corrected (R. 26; 177, 385-392). However, apart from a request by the Teamsters for the payment of a five-cents-an-hour wage increase, retroactive to February 1, 1943, which had been recommended by the National War Labor Board in a directive issued May 29, 1944, to which the Company and the Cosmetic Workers were parties, there were no negotiations with respect to wages (R. 25; 175, 196, 197, 266). Davis testified that no wage proposals were made to the Company (R. 175). Stevenson testified that wages were dis-

cussed only to the degree that "we agreed that there wouldn't be any great problem with the wage structure . . . But to that degree, no specific wages were set" (R. 274, 275). The testimony of both Davis and Stevenson was corroborated by Powers, a Company witness, who testified that wage schedules were not discussed at all and that Stevenson said nothing about wages except that they were not a present issue (R. 393).

When the meeting came to the union security clause of the Teamsters' proposed contract, Stevenson advised the Company that some form of union security would be necessary, but at the same time expressed his willingness to compromise with respect to the Teamsters' uniform practice of insisting upon a closed shop. He offered various alternatives to the closed shop, such as maintenance of membership, preferential hiring, and other modified forms, and then asked the Company's representatives to make some sort of proposal with respect to union security. (R. 27, 28, 105; 175, 179, 181, 273, 274, 280, 293, 455.) Mergenthaler, however, replied that the Company had always been opposed to union security, in any form, that he had no authority to negotiate with respect to union security, and that he would first have to obtain authority from the Company's national officers in Cincinnati, Ohio, before he could talk about or discuss union security with the Teamsters (R. 25, 27, 36, 105; 266, 267, 274, 281).

Mergenthaler also declared that the Company was barred by the War Labor Board's directive of May 29, 1944, from negotiating on union security with the Teamsters, inasmuch as the directive recommended that the Company grant maintenance of membership to the Cosmetic Workers (R. 107; 180, 181, 267, 268, 422, 465). Stevenson replied that the directive was no longer effective with respect to maintenance of membership for the Cosmetic Workers since the Teamsters had been designated and certified by the National Labor Relations Board as the exclusive bargaining representative of the Company's employees, and that, hence, there was no reason why the Company should not negotiate with the Teamsters on union security (R. 28; 181, 267, 268, 275, 277). The parties then agreed to adjourn the meeting until the Company's representatives obtained authority to negotiate with the Teamsters on union security. Mergenthaler promised Stevenson that the Company would advise the Teamsters of its position on union security within a week. (R. 105; 268, 281, 405.)

Several weeks passed, however, and the Teamsters, despite repeated calls by Stevenson to Mergenthaler and to various plant officials, had received no answer to its request for union security. The Teamsters then told the Company that if it did not attempt to negotiate sincerely by February 18, 1946, the Teamsters would resort to economic

pressure, including a strike and boycott. (R. 105; 301, 302, 458-462.) The Company began immediately to prepare for the threatened strike and boycott by increasing the daily production quota and by ordering the employees to work overtime on Saturday, February 16, and Sunday, February 17 (R. 106, n. 3; 226, 232, 234, 243). The Teamsters learned of these preparations, and ordered a strike which began Saturday morning, February 16 (R. 106, n. 3; 227, 228, 321-324). That same morning, according to his undenied testimony, John McGee, secretary-treasurer of the Teamsters, met Rothenberg, the Company's vice-president in charge of the Burbank plant, at the gate of the plant, and told him that "if he saw fit to sit down and negotiate with us * * * I would be there at any time it was all right with him." Rothenberg replied: "All right. Thank you," but never contacted McGee (R. 106; 323-325).

On February 17, the day after the strike began, the Teamsters received a letter, dated February 15, 1946, from Mergenthaler, (R. 106; 270, 487, 488), in which after discussing the War Labor Board's directive of May 29, 1944, he stated:

> I have taken up with the company the question of whether or not it would agree to a term in the contract which we have been negotiating looking to union security for the Teamsters' Union. The company finds itself unable to come to a decision upon this point

> until the above-mentioned order of the War Labor Board is revoked or disposed of in some other manner so as not to cause the company embarrassment in the future. My client is, however, ready and willing to continue negotiations as to other phases of the proposed contract.

Upon receiving the letter, Stevenson phoned Mergenthaler, and told him that "the position taken in the letter with respect to the failure to bargain until the War Labor Board had revoked or disposed of their order was an impossible situation, that insofar as I knew * * * the War Labor Board was not in existence and that I had offered at all times in discussing this case with Mr. Neary [an attorney for the company] to do anything within the union's power to assist them in clarifying the atmosphere so that we could go ahead with recognition, negotiations, and a contract" (R. 106; 107; 270, 271). The Company has at no time since writing the foregoing letter altered its position as set forth therein, nor has it expressed any willingness to negotiate with the Teamsters on the issue of union security (R. 42, 43; 462-464).

Effective July 1, 1946, during the height of the strike, the Company granted its employees a general wage increase of approximately 15 percent, which amounted to about 18 cents an hour (R. 38, 39; 247, 248, 491, 492). The Company stipulated at the hearing that, subsequent to February 16, 1947, there had been no negotiations between it

and the Teamsters relative to or concerning wages (R. 368). The Teamsters' strike was still in progress at the time of the hearing before the Board (R. 415-416).

Upon the basis of the foregoing facts and the entire record, the Board found that the Company, from the very outset, entered into negotiations with a fixed determination not to grant union security provisions or even to discuss them with the Teamsters, and that the Company had not acted in good faith in advancing the War Labor Board's directive as a ground for refusing to negotiate with respect to union security (R. 107-109). The Board pointed out that the Cosmetic Workers had become defunct before the Teamsters was certified, that the Company had refused to comply with the War Labor Board directive on the ground that the Cosmetic Workers did not represent a majority of its employees and that the Company's reliance upon the War Labor Board directive as a bar to negotiation of union security issues with the Teamsters was inconsistent with its willingness to negotiate other issues with the Teamsters inasmuch as that directive would be equally applicable to the execution of any kind of a contract with the Teamsters (R. 107-108). The Board rejected the contention of the Company that the Teamsters also failed to meet its statutory obligation by allegedly refusing to continue negotiations on other phases of the proposed contract until the matter of union security could be resolved. It held that, under the

circumstances, the Teamsters' insistence upon the Company bargaining with respect to union security did not impose a condition precedent upon negotiation of other terms of the proposed contract, and that the Teamsters' conduct did not absolve the Company of its own refusal to bargain collectively. (R. 109.) The Board, therefore, determined that the Company refused, on and after January 17, 1946, to bargain in good faith with the Teamsters within the meaning of Section 8 (5) of the Act (R. 109, 110).

The Board further found that the wage increase of July 1, 1946 had been granted unilaterally without prior consultation or negotiation with the Teamsters (R. 38-39, 47, 110). It, therefore, determined that the granting of the wage increase constituted an independent refusal to bargain within the meaning of Section 8 (5) of the Act (R. 47, 110). The Board concluded that by the aforesaid acts the Company had engaged and is engaging in unfair labor practices within the meaning of Section 8 (5) and 8 (1) of the Act (R. 49, 50).[2] Accordingly, it ordered the Company to cease and desist from refusing to bargain collectively with the Teamsters, from unilaterally changing wages of employees in the unit without prior negotiation with the Teamsters, and from in any other manner interfering with the

[2] The same provisions are continued in Section 8 (a) (5) and 8 (a) (1) of the Act, as amended by the Labor Management Relations Act of 1947. There is no difference between the original Act and the amended Act in this respect.

efforts of the Teamsters to bargain collectively with the Teamsters upon request, and to post an appropriate notice (R. 111-113).

The Board filed a petition for enforcement of its order in the court below on September 23, 1948 (R. 116-122). In its answer to the Board's petition, the Company alleged, *inter alia*, that as of that time none of its employees were members of the Teamsters (R. 127). The Board admitted the truth of this allegation in its brief in the court below.[3] In its answer and its brief in the court below, the Company also challenged the propriety of requiring it to bargain with the Teamsters respecting union security in view of the provisions of the Labor Management Relations Act requiring a union authorization election prior to the signing of such contracts (R. 127).

On May 17, 1949, the court handed down its opinion (R. 561-573), and entered its decree enforcing in full and without modification the Board's order (R. 574-578). With respect to the Teamsters' loss of majority, the court held that since it occurred subsequent to the Company's unfair labor practices, the loss must be attributed to the unfair labor practices (R. 567-570). The court further held that the Board's failure to consider the Teamsters' loss of majority and to make a

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[3] Brief for the National Labor Relations Board in the court below, p. 20, n. 21. A true copy of this brief has been lodged with the Clerk of this Court for the convenience of this Court.

finding as to its cause was immaterial in view of the Board's "known and established policy" of refusing to attempt to disentangle the consequences of an employer's unfair labor practice and of assuming that a loss of majority was due to prior unfair labor practices (R. 568-569). Accordingly, the court refused to remand the case to the Board for findings on the matter (R. 569, 570). With respect to the failure of the order to provide that the employer must bargain about union security only if the employees authorize the union so to bargain in an election as required by the Labor Management Relations Act, the court held the order must be construed as contemplating such compliance by the Teamsters with the Labor Management Relations Act (R. 566).

ARGUMENT

1. The Company's contention that the court below erred in enforcing the order to bargain with the Teamsters irrespective of whether the Teamsters at present has any membership among employees in the unit is based upon petitioner's view that the Board has no established policy respecting the effect of a union's loss of majority membership in such situations (Pet. 11). However, the Board has uniformly held that any loss of majority membership by a union subsequent to unfair labor practices is to be attributed to the unfair labor practices. *Matter of Karp Metal Products, Inc.*, 51 N. L. R. B. 621, 624-626. This Court has expressly

approved this Board policy.[4] The court below viewed this policy as so well "established and known" that the courts should themselves, without a remand to the Board, apply it in situations, such as this, where the facts respecting the loss of majority were not before the Board because they occurred subsequent to the close of the hearing (R. 566-570). As the court pointed out, a remand in this case would be "useless," since the order already entered by the Board is the same as the order it would devise if it had the new facts before it (R. 569-570). Other courts of appeal have similarly regarded a remand in such cases as unnecessary and have themselves applied the Board's policy respecting the effect of a loss of majority.[5] And this Court, in a like situation, has said: "It is obvious that the Board would apply such a policy to this case, thereby making a remand to the Board a mere formality and a needless addition to an already over-prolonged proceeding." *National Labor Relations Board* v. *Jones and Laughlin Steel Corporation,* 331 U. S. 416, 431.

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[4] *National Labor Relations Board* v. *P. Lorillard Co.*, 314 U. S. 512; *Franks Bros. Co.* v. *National Labor Relations Board*, 321 U. S. 702; *National Labor Relations Board* v. *Bradford Dyeing Ass'n.*, 310 U. S. 318, 339-340; *Int'l. Ass'n. of Machinists* v. *National Labor Relations Board*, 311 U. S. 72, 82.

[5] *National Labor Relations Board* v. *Swift & Co.*, 162 F. 2d 575 (C.A. 3), certiorari denied, 332 U.S. 791; *National Labor Relations Board* v. *Central Dispensary & Emergency Hospital*, 145 F. 2d 852 (C.A. D.C.), certiorari denied, 324 U.S. 847; *National Labor Relations Board* v. *Arnolt Motor Co.* (C.A. 7), decided March 9, 1949. Cf. *Great Southern Trucking Co.* v. *National Labor Relations Board*, 127 F. 2d 180 (C.A. 4), certiorari denied, 317 U.S. 652.

The Company cites (Pet. 21), as being in conflict with the decision below, *National Labor Relations Board* v. *Inter-City Advertising Co.,* 154 F. 2d 244 (C.A. 4); *National Labor Relations Board* v. *Goodyear Tire & Rubber Co.,* 129 F. 2d 661 (C.A. 5); *Stewart Die Casting Corp.* v. *National Labor Relations Board,* 114 F. 2d 849, 858-859 (C.A. 7), certiorari denied, 312 U. S. 680; *National Labor Relations Board* v. *American Mfg. Co.,* 106 F. 2d 61, 68-69 (C.A. 2), modified and affirmed, 309 U. S. 629; *National Labor Relations Board* v. *National Licorice Co.,* 104 F. 2d 655 (C.A. 2), modified on other grounds, 309 U. S. 350; and *National Labor Relations Board* v. *Maurice Eanet* (C.A.D.C.), decided September 27, 1948. In the *Inter-City* case, the only unfair labor practice found by the Board was one committed by the employer solely to enable it to test the validity of the Board's determination of an appropriate unit. In that circumstance, there being no evidence or finding, as here, of hostility to the Act or violations beyond that calculated to make judicial review possible, the court felt itself free to find "no room for the presumption * * * that the decline in union membership was due to the employer's refusal to bargain". 154 F. 2d at 247. Certainly, the Board's application of its "established and known" policy in the *Inter-City* situation confirms the conviction of the court below that a remand could only lead, *a fortiori,* to application of this policy to the stronger facts of this case.

That the *Inter-City* case rests on its "peculiar facts" is apparent from the Fourth Circuit's recent decision in *National Labor Relations Board* v. *Norfolk Shipbuilding & Drydock Co.*, 172 F. 2d 813, which squarely supports the decision below. The *Goodyear* case did not involve any bargaining order. The *American Mfg.*, *National Licorice*, and *Stewart* cases were decided prior to, and do not reflect, the decisions of this Court in the *Lorillard* and *Frank Bros.* cases, and, hence, are inapplicable here. The decision of the court in the *Eanet* case was vacated and the case set down for rehearing by order of the court. The decision below clearly does not present a conflict with other decisions.

The other cases cited by the Company in its argument on this point merely state that an administrative agency must explain the reason for its holdings.[6] However, as has been noted, this Court has made it clear that a court may itself apply without remand to the administrative agency, a policy the rationale for which has been fully set forth in prior decisions of the administrative agency. *National Labor Relations Board* v. *Jones & Laughlin Steel Corp.*, 331 U. S. 416, 428-429.

2. The only other question which we believe is presented by the petition is whether there is sub-

[6] *Phelps Dodge Corp.* v. *National Labor Relations Board*, 313 U. S. 177; *Securities and Exchange Commission* v. *Chenery Corp.*, 318 U. S. 80; *Jacob Siegel Co.* v. *Federal Trade Commission*, 327 U. S. 608, relied on by the Company (Pet. 11, 12, 13, 15, 21, 26, 30, 38, 40, 42).

stantial evidence to support the Board's findings of fact. This presents no question warranting review by this Court. Moreover, as the evidence set forth in the Statement (*supra,* pp. 4-10) shows, the Board's findings were fully supported by the record.

3. The Company's contention that the court below improperly refused to review the findings of the Board is based on the assumption that the court below ignored the Labor Management Relations Act of 1947 in deciding this case (Pet. 31-34).

A reading of the decision below, however, discloses that the court did in fact deal with the applicability of the 1947 amendments to the Act. Thus, the court, in reviewing the Board's order requiring the Company to bargain with the Teamsters, specifically considered the applicability of the 1947 amendments to Section 8 (3) (R. 566) and to Section 9 (c) (R. 569) of the Act. Moreover, contrary to the Company's allegation (Pet. 32), the court, in ruling that the trial examiner applied correct principles of law in excluding evidence, implicitly considered the applicability of the 1947 amendment to Section 10 (b) of the Act. The clear import of the Court's language (R. 573) is that the trial examiner's rulings on the admission of evidence were correct, even if the rules of evidence were deemed applicable, as provided for by the amended Act. The other instances, alleged by the Company, of the court's failure to determine the applicability of the 1947 amendments,

likewise, do not establish the Company's contention. That the court declined (Pet. 31, 32) to weigh the testimony of one witness on an issue of fact against the testimony of several witnesses in conflict, and that the court referred (Pet. 32) in its opinion to "substantial evidence" and not to "substantial evidence on the record considered as a whole" do not indicate that the applicability of the 1947 amendments was not dealt with by the court.

The Company further alleges (Pet. 34, 35) that the court below assumed the following facts, which the Company claims are not contained in the record:

> A union called the Cosmetic Workers had been certified bargaining agent for respondent's [Company's] employees subsequent to December 23, 1941. It had negotiated unsuccessfully with respondent for approximately one year, after which time it finally agreed to the Company's terms in an effort to obtain a contract. However, the Company then refused to bargain with the Cosmetic Workers on the ground that they no longer represented a majority of the employees. The question, along with a wage increase issue, was certified to the War Labor Board, and the directive of May 29, 1944, issued. Respondent refused to comply with any of its terms. Thereafter, the Cosmetic Workers Union, apparently discredited in its attempt to achieve effective recognition, affiliated with the Teamsters on July 1, 1945. (R. 563, 564)

The foregoing facts are to be found in the earlier representation case (*Matter of Andrew Jergens Company,* 64 N. L. R. B. 989, 990-991), which the Board, in accordance with Section 9 (d) of the Act, certified to the court below as part of the record in this case (R. 1, 2).

The Company also alleges (Pet. 35) that the court devised a finding of its own, when it referred to "respondent's continued efforts to circumvent the effect of the Teamsters' certification." The Board, however, made the equivalent finding when it found that the Company refused on and after January 17, 1946, to bargain in good faith with the Teamsters, and that the Company unilaterally granted a wage increase without prior consultation with the Teamsters (R. 109, 110). The Company makes the same allegation (Pet. 36, 37) with respect to the court's statement that the Company's delay in sending the letter of February 15, 1946, in reply to the Teamsters' request for the position of the Company on union security, may reasonably be attributed to "stalling" tactics by the Company. The Board, however, in discussing the position taken by the Company in its letter, found that the Company was refusing "by dilatory conduct" to come to a decision on union security (R. 46, 47). There are, moreover, findings by the Board that the Teamsters made repeated efforts to obtain an answer from the Company, and that, when these failed, the Teamsters resorted to strike activity to compel an answer (R. 105, 106). Hence the

court's statement cannot be said to be an independent finding beyond the findings of the Board.

The Company further alleges (Pet. 38, 39) that the court, in reviewing the Board's determination that the Company's unilateral grant of a wage increase constituted an independent refusal to bargain, substituted its own ground of liability for that of the Board. The opinion below shows that the court recited the Board's finding that the wage increase constituted an independent refusal to bargain, held that the finding was supported by substantial evidence, and, rejecting the Company's contention, explained why under the circumstances unilateral action was not justified (R. 570, 571). The Company claims that the court's statement that "the unilateral wage increase may be said to have been in furtherance of" the refusal to bargain on union security (R. 571), is a deviation from the Board's finding that the wage increase constituted an independent refusal to bargain. There is clearly no merit to such a contention.

The Company makes the same allegation (Pet. 39) with respect to the review by the court of the Board's determination that the War Labor Board's directive was not a legal bar to collective bargaining with the Teamsters. The opinion below shows that the court, after noting that the directive was, as of the January 17, 1946 meeting, inapplicable by its own terms, and further that it was at most advisory and was not enforceable by legal

process, held that the "directive furnished no legitimate basis or justifiable reason for respondent's refusal to bargain" (R. 565). The Board had found (R. 108, n. 6) that the "directive did not constitute a legal bar to negotiations" with the Teamsters, after noting that, as of the January 17, 1946 meeting, the directive "was for all purposes a nullity" inasmuch as the War Labor Board had adopted the policy of not applying sanctions in the event of non-compliance (R. 44). It cannot be said then that the court disagreed with or deviated from the grounds upon which the Board based its determination.

4. The Company's question number "4", "Is a general wage increase granted five months after the strike in an amount not exceeding that negotiated with the union, a refusal to bargain, when wages had been fully negotiated and the impasse arose with respect to union security alone?" (Pet. 9), is not properly before this Court. The Board found, and the court below sustained its finding, that the wage increase granted had never been negotiated upon between the Company and the Teamsters (R. 38-39, 47, 110, 570-572). Indeed no witness testified that the Company and the Teamsters at any time discussed a 15 percent increase.

5. The Company's question number "1", "May the petitioner be ordered to bargain on the issue of union security without provision for an election in compliance with Section 8 (a) (3) of the Act, as amended?" (Pet. 9) is not before this Court.

The Board conceded in the court below that the order did not require the Company to bargain with the Teamsters concerning union security until the Teamsters won a union security election conducted by the Board in accordance with the provisions of Section 8 (a) (3) of the Act as amended.[7] The court below adopted the same view and expressly so stated in its decision (R. 566).

6. The Company's question numbered "7", "Where no unfair labor practice is found other than refusal to bargain as to union security and grant of a unilateral wage increase, may an order to bargain with respect to rates of pay, wages, hours and other conditions of employment, to take affirmative action and to cease and desist from interfering in any manner with the efforts of the union to bargain, be enforced without modification?" (Pet. 10), is, likewise, not properly before this Court. The Company in its exceptions to the trial examiner's intermediate report included no challenge to the breadth of the recommended order (R. 50-52), which the Board subsequently adopted as its own without relevant change (R. 110-113). Section 10 (e) of the Act precludes consideration by a court of an objection that has not been urged before the Board. *National Labor Relations Board* v. *Cheney California Lumber Co.*, 327 U. S. 385. Nor was this question argued or even mentioned in the Company's brief filed in the court below. Moreover,

[7] Brief for the National Labor Relations Board in the court below, p. 31.

there is no merit to the Company's contention (Pet. 54) that the decision of the court below to enforce the Board's order without modification conflicts with the decisions of the Court in *National Labor Relations Board* v. *Crompton-Highland Mills,* 337 U. S. 217, and in *National Labor Relations Board* v. *Express Publishing Company,* 312 U. S. 426.

In the *Crompton-Highland* case, this Court restricted the scope of the Board's order to remedying the unfair labor practice found, namely, a unilateral grant of a wage increase constituting a refusal to bargain, on the ground that there were no other findings by the Board that established a lack of good faith or lack of consistency with the principles of collective bargaining on the part of the employer. However, in this case, the Board did find that the Company generally refused to bargain collectively in good faith with the Teamsters, as well as that the Company's unilateral grant of a wage increase constituted an independent refusal to bargain (R. 108, 109). The Board further found that the Company had acted in bad faith in advancing the War Labor Board's directive as a ground for refusing to bargain on union security (R. 107, 108), a ground which the Company continues to advance. The Board's order is in full accord with the principles established by this Court in the *Express Publishing* case (312 U. S., at 436, 437). Hence, even if the Company's question were properly before this Court, it would not justify further review.

CONCLUSION

The decision below, sustaining the Board's findings and order, is correct and presents neither a conflict of decision nor any new or novel questions. The petition for a writ of certiorari should be denied.

Respectfully submitted,

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SEPTEMBER, 1949.

APPENDIX

1. The relevant provisions of the National Labor Relations Act (Act of July 5, 1935, c. 372, 49 Stat. 449, 29 U. S. C. 151, *et seq.*) are as follows:

RIGHTS OF EMPLOYEES

SEC. 7. Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in concerted activities, for the purpose of collective bargaining or other mutual aid or protection.

SEC. 8. It shall be an unfair labor practice for an employer—

(1) To interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7.

* * * * *

(5) To refuse to bargain collectively with the representatives of his employees, subject to the provisions of Section 9 (a).

PREVENTION OF UNFAIR LABOR PRACTICES

* * * * *

Sec. 10. * * *

(e) The Board shall have power to petition any circuit court of appeals of the United States * * * wherein the unfair labor practice in question occurred or wherein such person

resides or transacts business, for the enforcement of such order and for appropriate temporary relief or restraining order, and shall certify and file in the court a transcript of the entire record in the proceeding, including the pleadings and testimony upon which such order was entered and the findings and order of the Board. Upon such filing, the court shall cause notice thereof to be served upon such person, and thereupon shall have jurisdiction of the proceeding and of the question determined therein, and shall have power to grant such temporary relief or restraining order as it deems just and proper, and to make and enter upon the pleadings, testimony, and proceedings set forth in such transcript a decree enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part the order of the Board. No objection that has not been urged before the Board, its member, agent or agency, shall be considered by the court, unless the failure or neglect to urge such objection shall be excused because of extraordinary circumstances. The findings of the Board as to the facts, if supported by evidence, shall be conclusive. * * *

2. The relevant provisions of the Labor Management Relations Act, 1947 (61 Stat. 136, 29 U. S. C., Supp. II, 141, *et seq.*) are as follows:

* * * * *

Sec. 101. The National Labor Relations Act is hereby amended to read as follows:

* * * * *

RIGHTS OF EMPLOYEES

"Sec. 7. Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 8 (a) (3).

UNFAIR LABOR PRACTICES

"Sec. 8 (a). It shall be an unfair labor practice for an employer—

"(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7;

* * * * *

"(3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization: *Provided,* That nothing in this Act or in any other statute of the United States, shall preclude an employer from making an agreement with a labor organization (not established, maintained, or assisted by any action defined in section 8 (a) of this Act as an unfair labor practice) to require as a condition of employ-

ment membership therein on or after the thirtieth day following the beginning of such employment or the effective date of such agreement, whichever is the later, (i) if such labor organization is the representative of the employees as provided in section 9 (a), in the appropriate collective-bargaining unit covered by such agreement when made; and (ii) if, following the most recent election held as provided in section 9 (e) the Board shall have certified that at least a majority of the employees eligible to vote in such election have voted to authorize such labor organization to make such an agreement * * *

* * * * *

"(5) To refuse to bargain collectively with the representatives of his employees, subject to the provisions of section 9 (a).

* * * * *

REPRESENTATIVES AND ELECTIONS

* * * * *

"SEC. 9. * * *

"(c) (1) Whenever a petition shall have been filed, in accordance with such regulations as may be prescribed by the Board—

"(A) by an employee or group of employees or any individual or labor organization acting in their behalf alleging that a substantial number of employees (i) wish to be represented for collective bargaining and that their employer declines to recognize their representative as the representative de-

fined in section 9 (a), or (ii) assert that the individual or labor organization, which has been certified or is being currently recognized by their employer as the bargaining representative, is no longer a representative as defined in section 9 (a); or

"(B) by an employer, alleging that one or more individuals or labor organizations have presented to him a claim to be recognized as the representative defined in section 9 (a);

the Board shall investigate such petition and if it has reasonable cause to believe that a question of representation affecting commerce exists shall provide for an appropriate hearing upon due notice. * * * If the Board finds upon the record of such hearing that such a question of representation exists, it shall direct an election by secret ballot and shall certify the results thereof.

* * * * *

"(d) Whenever an order of the Board made pursuant to section 10 (c) is based in whole or in part upon facts certified following an investigation pursuant to subsection (c) of this section and there is a petition for the enforcement or review of such order, such certification and the record of such investigation shall be included in the transcript of the entire record required to be filed under section 10 (e) or 10 (f), and thereupon the decree of the court enforcing, modifying, or setting aside in whole or in part the order of the Board shall be made and entered upon the pleadings, testimony, and proceedings set forth in such transcript.

PREVENTION OF UNFAIR LABOR PRACTICES

"SEC. 10. * * *

"(b) Whenever it is charged that any person has engaged in or is engaging in any such unfair labor practice, the Board, or any agent or agency designated by the Board for such purposes, shall have power to issue and cause to be served upon such person a complaint stating the charges in that respect, and containing a notice of hearing before the Board or a member thereof, or before a designated agent or agency, at a place therein fixed, not less than five days after the serving of said complaint * * *. The person so complained of shall have the right to file an answer to the original or amended complaint and to appear in person or otherwise and give testimony at the place and time fixed in the complaint. In the discretion of the member, agent, or agency conducting the hearing or the Board, any other person may be allowed to intervene in the said proceeding and to present testimony. Any such proceeding shall, so far as practicable, be conducted in accordance with the rules of evidence applicable in the district courts of the United States under the rules of civil procedure for the district courts of the United States, adopted by the Supreme Court of the United States pursuant to the Act of June 19, 1934 (U. S. C., title 28, secs. 723-B, 723-C).

"(c) * * * If upon the preponderance of the testimony taken the Board shall be of the

opinion that any person named in the complaint has engaged in or is engaging in any such unfair labor practice, then the Board shall state its findings of fact and shall issue and cause to be served on such person an order requiring such person to cease and desist from such unfair labor practice, and to take such affirmative action including reinstatement of employees with or without back pay, as will effectuate the policies of this Act * * * If upon the preponderance of the testimony taken the Board shall not be of the opinion that the person named in the complaint has engaged in or is engaging in any such unfair labor practice, then the Board shall state its findings of fact and shall issue an order dismissing the said complaint. * * *

* * * * *

"(e) The Board shall have power to petition any circuit court of appeals of the United States (including the United States Court of Appeals for the District of Columbia), * * *, within any circuit * * * wherein the unfair labor practice in question occurred or wherein such person resides or transacts business, for the enforcement of such order and for appropriate temporary relief or restraining order, and shall certify and file in the court a transcript of the entire record in the proceedings, including the pleadings and testimony upon which such order was entered and the findings and order of the Board. Upon such filing, the court shall cause notice thereof to be served upon such person, and

thereupon shall have jurisdiction of the proceeding and of the question determined therein, and shall have power to grant such temporary relief or restraining order as it deems just and proper, and to make and enter upon the pleadings, testimony, and proceedings set forth in such transcript a decree enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part the order of the Board. No objection that has not been urged before the Board, its member, agent, or agency, shall be considered by the court, unless the failure or neglect to urge such objection shall be excused because of extraordinary circumstances. The findings of the Board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall be conclusive. If either party shall apply to the court for leave to adduce additional evidence and shall show to the satisfaction of the court that such additional evidence is material and that there were reasonable grounds for the failure to adduce such evidence in the hearing before the Board, its member, agent, or agency, the court may order such additional evidence to be taken before the Board, its members, agent, or agency, and to be made a part of the transcript. The Board may modify its findings as to the facts, or make new findings, by reason of additional evidence so taken and filed, and it shall file such modified or new findings, which findings with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall be conclusive, and shall file its

recommendations, if any, for the modification or setting aside of its original order. The jurisdiction of the court shall be exclusive and its judgment and decree shall be final, except that the same shall be subject to review * * * by the Supreme Court of the United States upon writ of certiorari or certification as provided in sections 239 and 240 of the Judicial Code, as amended (U.S.C., title 28, secs. 346 and 347)."

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IN THE

Supreme Court of the United States

October Term, 1949.

No. 225

THE ANDREW JERGENS COMPANY, a corporation,

Petitioner,

vs.

NATIONAL LABOR RELATIONS BOARD,

Respondent.

BRIEF FOR PETITIONER IN REPLY TO ANSWER OF RESPONDENT.

Having filed herein a petition for certiorari, and the respondent National Labor Relations Board having filed a brief in opposition thereto which is misleading, the Petitioner, The Andrew Jergens Company, a corporation, submits this brief in reply thereto.

I.

An Order to Bargain with a Union No Longer Representing Any Employees of Petitioner and Which Lack of Representation the Board Did Not Consider, Should Not Be Enforced.

In the Court of Appeals, and in its petition for certiorari (pp. 19-30), Petitioner has contended that the order to bargain with the Teamsters should not be enforced, inasmuch as it is admitted by all parties that the Teamsters does not represent any employees of Petitioner at this time, a fact which the Board did not consider in framing its order. In fact the Trial Examiner found that the Teamsters did represent a majority of the employees [R. 23-24], and the Board expressly stated in issuing the order that the Teamsters represented a majority of employees [R. 110].

The Board, in its brief (p. 13), has contended that it always assumes that any loss of majority subsequent to unfair labor practices is to be attributed to those unfair labor practices, and cited for that principle *The Matter of Karp Metal Products Company, Inc.,* 51 N. L. R. B. 621, 624-626. The Board necessarily contends, of course, that such assumption is made in all cases as a matter of law without regard to the circumstances. Apart from the validity of such presumption it is submitted that the Board has not established or shown that any such presumption exists among the decisions of the Board. The case cited for the presumption, *Matter of Karp Metal Products,* does not appear to establish any such principle, and it will be observed that that case lists at great length, and treats as material, the long history of violent and flagrant unfair labor practices committed by the employer.

Only one case need be cited to disprove the existence of such a presumption. In *Matter of Fainblatt,* the Board had found the employer guilty of unfair labor practices, including a refusal to bargain with the Union, and ordered the employer to bargain with that union. The Board petitioned the Court of Appeals for the Third Circuit for enforcement, and the employer filed a petition to adduce additional evidence, part of which evidence would show a shift in union representation due to an increase in number of employees. This petition was granted, and the matter remanded to the Board. The Court of Appeals' decision is apparently not published, but the Board's decision on remand completely and unequivocally refutes the Board's position here as to the existence of its asserted presumption, for the Board on remand found that it would not effectuate the purposes of the Act to require the employer to bargain with the Union whose majority representation was in doubt. The Board stated there, 4 N. L. R. B. 596, at 600-601:

> "The Board therefore reiterates what it said in regard to the violation of Section 8 (5) of the Act. That violation is not affected by any subsequent change in the situation. However, testimony that the number of permanent employees in the plant has risen from 59 to approximately 200 is uncontradicted. Two years have now elapsed since the respondents' first refusal to bargain collectively, which precipitated the strike. The Board has no evidence before it as to the present membership in Local No. 149 among the greatly increased force now employed. In view of these circumstances, the Board will amend its order by striking out that part which requires the re-

spondents to bargain collectively with Local No. 149. * * *"

Matter of Fainblatt, 4 N. L. R. B. 596, at 600-601.

The above case conclusively establishes that this matter must be remanded to the Board and its consideration of the loss of majority required. In this connection, it is interesting to note that of the cases cited by Petitioner (brief supporting petition, pp. 14, 21-22) which remanded the matter to the Board for consideration of loss of majority, the Board took no further action in any of them except *Matter of Karp Metal Products Company*, relied on by the Board to establish the presumption. Such timidity is hardly consistent with the existence of such a presumption.

The Board states, however, that its legal presumption has been approved by this Court on numerous occasions, citing therefor page 14, footnote 4, several decisions of this Court. These decisions cited by the Board were discussed in the petition and it is clear that those cases in no way involve the problem presented here.

In all of those cases *the Board was aware before it issued its order to bargain that the union in question no longer represented a majority of the employees.* In all of those decisions the Board considered the loss of such majority and came to the conclusion that it would be necessary, in order to effectuate the purposes of the act, to require the employer to bargain with the union. The decisions of this Court cited by the Board simply affirm that

in such circumstances the Board may require an employer to bargain with a minority union. Far from being any support for the Board's contention, these cases recognize that it is necessary for the Board to consider the loss of majority before the employer can be required to bargain with a minority union. So clear is this distinction that Petitioner has taken the space to list below the cases cited by the Board and quote short excerpts therefrom to show that they do not support the Board's position, but, on the contrary, give support to the Petitioner's position:

National Labor Relations Board v. P. Lorillard Company, 314 U. S. 512, involved a situation in which the Court of Appeals held that the order to bargain could not be enforced because such a length of time had elapsed since the order that it could not be supposed that the union still represented a majority of the employees. The Court reversed such decision of the Court of Appeals *because the Board had in fact considered the loss of majority* and this Court stated:

> ". . . *The Board had considered the effect* of a *possible shift in membership,* alleged to have occurred subsequent to Lorillard's unfair labor practice. But it had reached the conclusion that in order to effectuate the policies of the Act, Lorillard must remedy the effect of its prior unlawful refusal to bargain by bargaining with the union shown to have had a majority on the date of Lorillard's refusal to bargain. This was for the Board to determine, . . ." (Emphasis added.)
>
> *National Labor Rel. Bd. v. P. Lorillard Co.,* 314 U. S. 512, 513; 86 L. Ed. 382-383.

Franks Bros. Company v. National Labor Relations Board, 321 U. S. 702, is also a case in which the Board considered the loss of majority. This is clear from the following excerpt of the opinion of this Court:

> "In reaching its conclusion as to the appropriate remedy for these unfair practices, *the Board considered petitioner's contention that during the seven-month interval between the filing of the charges and the issuance of the complaint, thirteen of the Union's original members had been replaced by new employees in the normal course of business.* This left the Union with only thirty-two of the eighty-five employees then in the unit which it represented, or *less than a majority.* * * *" (Emphasis added.)
>
> *Franks Bros. Co. v. National Labor Rel. Bd.,* 321 U. S. 702, 703; 88 L. Ed. 1022.

The *Franks* case gives particular support to Petitioner's position herein, as shown by the manner in which the Court discussed the *P. Lorillard Company* case, *supra,* and the case of *National Labor Relations Board v. Fansteel Metallurgical Corp.,* 306 U. S. 240. This discussion is quoted in Petitioner's brief supporting its petition, pages 24-25.

National Labor Relations Board v. Bradford Dyeing Assoc., 310 U. S. 318, is directly contrary to the Board's contention that there is a conclusive legal presumption such as it describes, and is in fact in direct support of Petitioner's contention that the Board must consider the loss of majority before ordering the employer to bargain with a minority union. This is reflected in the following quotation from the decision of this Court:

> ". . . However, *the Board found that 'the record is clear that, had it not been for the unfair labor*

practices of the respondent in organizing and fostering the Federation and in persuading, intimidating and coercing its employees to join the Federation and leave the T. W. O. C., the *respondent's employees would have remained members of the T. W. O. C.*'" (Emphasis added.)

National Labor Rel. Bd. v. Bradford Dyeing Assoc., 310 U. S. 340; 84 L. Ed. 1241.

International Association of Machinists etc. v. National Labor Relations Board, 311 U. S. 72, involved a case in which an intervening union contended at the Board's hearing that it represented a majority of the employees and that the union with which Petitioner was ordered to bargain no longer represented a majority of the employees. The decision of this Court in that case makes it clear that before an employer may be required to bargain with a union which does not represent a majority of its employees the Board itself must give consideration to the cause of such loss of majority and exercise its discretion as to the proper method of correcting the results of the unfair labor practices. The decision of this Court states:

". . . *Where as a result of unfair labor practices a union cannot be said to represent an uncoerced majority,* the Board has the power to take appropriate steps to the end that the effect of those practices will be dissipated. *That necessarily involves an exercise of discretion on the part of the Board*—discretion involving an expert judgment as to ways and means of protecting the freedom of choice guaranteed to the employees by the Act. It is *for the Board not the courts to determine how the effect of prior unfair labor practices may be expunged.*" (Emphasis added.)

International Assoc., etc. v. National L. Rel. Bd., 311 U. S. 82; 85 L. Ed. 57.

By what manner of reasoning the Board reaches its conclusion that the above cases give support to its position, and to the validity of its presumption, is beyond the comprehension of this counsel. In all these cases the Board gave the consideration to the loss of majority representation which Petitioner seeks to require it to give here. In affirming the Board's action this Court made it clear in those cases that if the Board had not given such consideration to the loss of majority the order would not have been enforced.

The Petitioner in its petition and supporting brief (pp. 14, 21) cited several cases as being directly in conflict with the decisions of the Court of Appeals below in holding that although the Board did not consider the loss of majority, and although the Board even assumed that the union did represent a majority, the Petitioner would nevertheless be required to bargain with the union without the necessity of any consideration by the Board of the loss of majority.

The Board attempts to distinguish those cases (pp. 15-16 of its Brief), and the manner in which it does so suggests that the Board has not at all understood the question involved in this petition.

The case of *National Labor Relations Board v. Inter-City Advertising Co., Inc.*, 154 F. 2d 244 (C. A. 4), relied upon by Petitioner, was one in which the Board apparently invoked its so-called legal presumption and which the Court of Appeals refused to recognize. It is clear from the opinion (154 F. 2d at 247) that the Court holds that such a presumption is not conclusive, and recognizes that there are cases in which a loss of majority occurring subsequent to unfair labor practices may be attributed to reasons other than unfair labor practices, in

which cases the Board abuses its discretion in requiring the employer to bargain with the minority union. The Board's distinction of this case amounts to no more than a naive argument that since its error committed in that case was greater than the error comimtted in this case, this Petitioner should not be heard to complain.

The case of *National Labor Relations Board v. Goodyear Tire & Rubber Co.*, 129 F. 2d 661 (C. A. 5), relied upon by Petitioner, was distinguished in the Board's brief (p. 16) with the simple statement that that case did not involve any bargaining order. While that case did not involve an order to bargain as such, sections A and B of the Board's order (21 N. L. R. B. 306, 446) required the employer to cease and desist from dominating or interfering with a specified union (Etowah) by contributing support to such union, and also from recognizing that union as the representative of its employees. The case is surely in point as support for Petitioner's position as reflected by the following statement in the decision of the Court of Appeals:

> ". . . The proper course, as to whether Etowah does now, and its right as affected by company domination and support to, represent the employees, is, retaining jurisdiction of the case on that issue, to remit it to the Board for further hearing and findings."
>
> *National Labor Rel. Bd. v. Goodyear Tire & Rubber Co.*, 129 F. 2d 661, 667.

The cases of *National Labor Relations Board v. American Mfg. Co.*, 106 F. 2d 61 (C. A. 2), modified and affirmed 309 U. S. 629; *National Labor Relations Board v. National Licorice Co.*, 104 F. 2d 655 (C. A. 2), modified on other grounds 309 U. S. 350; and *Stewart Die*

Casting Corp. v. National Labor Relations Board, 114 F. 2d 849 (C. A. 7); relied upon by Petitioner, were distinguished by the Board on the ground of having been decided prior to the decision of this Court in the cases of *National Labor Relations Board v. P. Lorillard Co.,* 314 U. S. 512; *Franks Bros. Company v. National Labor Relations Board,* 321 U. S. 702. This represents another instance of the Board's ostrich-like persistence in refusing to acknowledge the holdings of the latter cases, which have been discussed above and which clearly support the cases relied upon by Petitioner.

In fact, in the *American Mfg Company* case, the Court of Appeals held, 106 F. 2d 61, 68-69, that the order to bargain could not be enforced, because, due to the lapse of time, the Court did not feel that there was any certainty that the union represented a majority of the employees. The Court of Appeals made its order enforcing the order to bargain conditional upon the Board's ascertaining by an election whether the union represented a majority of the employees. This Court granted certiorari in that case in 309 U. S. 629 and modified the order in a particular which is in no way material here, and expressly stated that in all other respects the order, of the Court of Appeals, was affirmed. While the decision of this Court in that case was a memorandum decision, it is an express affirmance of the principle relied upon by Petitioner and completely refutes the contention of the Board that this Court has approved its so-called legal presumption. This Court there clearly demonstrated that the Court of Appeals, in its decision below, was in error in holding that the Board did not have to consider the loss of majority in a situation where, as here, the Board expressly stated in its decision that it assumed that the union at that time represented a majority of the employees.

II.

The Conclusive Legal Presumption Asserted by the Board, if It Exists at All, Is an Improper Exercise of the Board's Powers Under the Provisions of the Labor Management Relations Act of 1947.

Under the Wagner Act, the National Labor Relations Act of 1935, the Board's history of deciding cases upon its "expertness" is familiar to all. The conclusive legal presumption asserted by the Board here is a typical example of the Board's exercise of its supposed "expertness;" it is a typical example of how, under the Wagner Act, the Board sought, and succeeded, in dispensing with the necessity that it have sufficient evidence to support its findings and conclusions; it is a typical example of its theoretic thinking in these cases.

However valid such presumptions and methods may have been under the Wagner Act, it would seem clear that under the Labor Management Relations Act of 1947 the Congress desired to remove entirely the basis of "expertness" from the Board's discretion and require it, as it does of other tribunals, to decide only upon evidence.

As pointed out in Petitioner's brief (p. 28), supporting its petition, the managers of the bill in the House stated, H. R. 510, 80th Congress, pp. 55-56, in referring to the requirement of the Taft-Hartley Act, with respect to evidence, "The language also *precludes the substitution of expertness for evidence* in making decisions." (Emphasis added.) The Conference and House reports discuss at some length the criticisms which have been leveled at the Board's use of its "expertness" in place of evidence and points out the tremendous abuses such substitution has

caused in the exercise of the Board's powers. This report states, pages 40-41, H. R. 245, 80th Congress:

> "However repugnant to the courts the Board's decisions may seem, the act, by making the Board in effect its own Supreme Court so far as its findings of fact are concerned, renders the courts all but powerless to correct the Board's abuses.
>
> "Courts often have deferred to the assumed expertness of the Board when their own judgment would lead them to disagree. The Board's expertness is largely theoretic. . . .
>
> "Requiring the Board to rest its rulings upon facts, not interferences [*sic*], conjectures, backgrounds, imponderables, and presumed expertness will correct abuses under the act.
>
> "The bill does this, by providing in section 10(b) of the amended Labor Act that 'so far as practicable,' the new Board's proceedings shall be conducted 'in accordance with the rules of evidence applicable in the district courts of the United States under the rules of civil procedure'."

It is not to be assumed that the Board's presumption was valid even under the Wagner Act. In Petitioner's brief (pp. 25-27) supporting its petition, are discussed the decisions of this Court of *Phelps Dodge Corp. v. National Labor Relations Board,* 313 U. S. 177 and *Jacob Siegel Co. v. Federal Commission,* 327 U. S. 608, which clearly hold that the Board must give consideration to all matters which affect its choice of remedies.

The Board's brief (pp. 14, 16), refers to the decision of this Court in *National Labor Relations Board v. Jones*

and Laughlin Steel Corp., 331 U. S. 416, and considers it support for the Court of Appeals' action in invoking the presumption with respect to the loss of majority without remand to the Board. That case involved a change in the unit content, a matter which clearly can be reduced to a stable rule, and a matter of small importance and effect when compared with the loss of majority representation which involves the right of employees to choose their representative and appropriateness of the remedy. Furthermore, before relying upon that case the Board must conclusively show that it would apply a stereotype formula if remanded, which it clearly has not done.

It is, therefore, the Petitioner's position, with respect to loss of majority, that the Court of Appeals' decision is in direct conflict with the decisions of the courts of other circuits and with the decisions of this Court. It is also submitted that the Court of Appeals itself was the creator of this conclusive legal presumption and not the National Labor Relations Board, which, of course, is a complete usurpation of the function of the Board. It is further submitted that even if the Board has such a legal presumption as it describes, the decisions of the Courts of Appeals are in conflict as to whether such a presumption is valid, as reflected by the decision of the Court of Appeals below and the decision, among others, of the Fourth Circuit in *National Labor Relations Board v. Inter-City Advertising Company*. It is finally submitted that apart from all these considerations, and even assuming that the Board does have such a legal presumption as it urges here, such a procedure is invalid under the provisions of the Labor Management Relations Act of 1947, which requires that the Board use evidence in lieu of its "expertness."

III.

The Lack of Substantial Evidence to Support the Board's Findings.

The Board's brief (p. 17) states that this question is not one warranting review. Just what is meant by this statement is not understood by this counsel, as Petitioner has urged at every opportunity, before the National Labor Relations Board, Court of Appeals, both in the original hearing and in the petition for rehearing, and in its petition for certiorari in this Court, that there was no substantial evidence to support the Board's findings of facts.

Especially is this true of the Board's finding that Petitioner put forth its position with respect to the effect of the War Labor Board order in bad faith. There was a direct conflict in the evidence as to which party it was who urged the other to join with it in a petition to the War Labor Board to secure a clarification of this order. Each party testified that it made such a request of the other party but that no co-operation could be secured. Yet, the Board expressly states in its decision that it need not resolve this conflict as to which was the moving party in seeking clarification of the War Labor Board order.

At page 450 of the record, the following testimony was given by Petitioner's witness:

> "Q. And Mr. Stevenson refused to join you in any application to the War Labord Board? A. That is right."

Other testimony with respect to the many efforts made by Petitioner directly to the War Labor Board to have it modify its order is contained in the record at the following references: R. 464, 422, 447. And of great interest in connection with whether Petitioner was sincere in expressing doubt as to the effect of the War Labor Board

order is the testimony [R. 448] that the Conciliation Commissioner, Mr. Oliver Goodwin, explained to the union representatives that the company's statement that its disregard of the War Labor Board order might cause Petitioner to be unable to deduct the compensation paid was, in the opinion of Mr. Goodwin, correct.

With such evidence in the record, the Board finds that since, *in its opinion,* the War Labor Board order had no legal effect, that, therefore, Petitioner's position with respect to the order was a refusal to bargain, expressly stating [R. 108, footnote 6] that it *does not resolve* the evidentiary conflict as to which of the parties sought modification and clarification of the War Labor Board order. The most illuminating evidence of Petitioner's good faith was in this manner ignored by the Board.

It is inconceivable that counsel for the Board can seriously and sincerely contend that the question of whether there was substantial evidence to support the findings is not one warranting review. The same may be stated as to many other findings of fact made by the Board in an arbitrary manner in total disregard of the realities of the situation and evidence. (See especially, Petitioner's Brief supporting petition pp. 45-49.)

The argument put forth under this title is also contained, and enlarged upon, in Petitioner's brief (pp. 49-53) supporting its petition. The only attention the Board's brief gives such argument is its dogmatic statement that the question does not warrant review. It is respectfully submitted that the Board's recalcitrance in avoiding substance and reverting to dogmatism, by which method it gives no assistance to this Court, should be considered an admission that the Board has no merit to its position sufficient to support argument and discussion.

IV.

The "Unilateral" Wage Increase Was Not a Refusal to Bargain Inasmuch as the Same Increase Had Been Offered to the Union.

See brief supporting petition, pages 42-45.

In the Board's brief (p. 21), the Board makes reference to the record in several places for the proposition that the Board found that the wage increase granted had never been negotiated upon by Petitioner and the Teamsters. The references made by the Board are not findings of fact but are more in the nature of conclusions of law and it is those conclusions which we here attack. It is admitted by Petitioner that it granted a 15 per cent wage increase and that it did not negotiate that increase with the Union immediately prior to putting it into effect. The Petitioner even admits that in its negotiations with the Teamsters, on January 17, 1946, in which wages were discussed, that the figures "15%" were not mentioned. However, the parties did discuss wages at this meeting, and, as shown by the testimony of the union representatives, the parties were in agreement on wages, and wages presented no obstacle. [R. 26, 28, "Nobody reached a disagreement until we came to the question of union security."] The exact agreement which was made with respect to wages was "that the regular scale throughout the country would probably prevail and we could come to an agreement on that" [R. 30] and also "Well, we are demanding 30% increase, but that is not a matter standing in the way. If we get this union security clause fixed up, why we will go on with whatever the big boys do back in Washington." [R. 34.]

In Petitioner's argument in its brief, to the effect that it had offered a 15 per cent increase to the union previous to putting it into effect, it had in mind that the union had agreed that whatever increase which was established by national industries in general would be satisfactory to it. The Court may take judicial notice, because it is a matter of common knowledge, that during the period involved here, which was the reconversion period, the post-war wage level was being set and eventually concluded to be general wage raises from 15 to 18½ cents per hour. The wage increase, put into effect on July 1, 1946, was in keeping with that national increase with which the union had agreed.

Petitioner contends, therefore, that the wage increase was not, in fact, "unilateral," as the union had agreed to the wage increase by means of agreeing to an external standard to which the wage increase was equal. In any event, whether viewed as a unilateral increase or not, the amount given was within that negotiated with the Teamsters, and is, therefore, within the scope of the approval given such increases by this Court, in *National Labor Relations Board v. Crompton-Highland Mills, Inc.*, 93 L. Ed. 918. See Petitioner's brief supporting petition, pp. 44-45.

The Board's brief (p. 21) states that the question of this wage increase is not properly before this Court. No reason is given to support that assertion. It is an assertion which manifestly is without ground or reason, without merit or support, uttered with the realization that its success lay only through its smug audacity. It is such reasoning, devoid or reality and substance, which Petitioner urges is the basis of the Board's error.

V.

Conclusion.

The Other points urged by Petitioner in its brief supporting the petition, only some of which are referred to in the Board's brief herein, will not be reargued here.

Such other points consist in the Court of Appeals' failure to determine the applicability of the amendments of the Taft-Hartley Act (brief supporting petition pp. 31-34); that the Court of Appeals exceeded its function of review by substituting findings of its own, considering facts not of record, and going beyond the Board's basis for its order (brief supporting petition pp. 34-41); the effect of the Union's refusal to bargain in good faith (brief supporting petition pp. 45-49); and the scope of the order (brief supporting petition pp. 54-55). With reference to the scope of the order, the Board's brief (p. 22) repeats its often-stated dogmatic assertion that the question is not properly before the court, and makes its only attempt to support such assertion by stating (p. 22) that the Petitioner did not except to the breadth of the Trial Examiner's recommended order. This is indeed an amazing statement, inasmuch as Petitioner obviously did except to the scope of the recommended order as shown by the 63rd exception to the Intermediate Report, R. 102.

In Petitioner's brief supporting petition (pp. 34-35), we stated that 16 lines contained in the Court's decision and dealing with Petitioner's history with the Cosmetic Workers Union was nowhere in the record and was an example of how the Court considered facts not of record. In the Board's brief (pp. 18-19) this material from the Court's opinion is quoted and it is stated that these facts are to be found in the earlier representation case which

was certified by the Board to the Court below as part of the record, and citing the record [pp. 1 and 2]. This is another glaring inaccuracy on the part of the Board. The references to the record were nothing more than a list of the matters certified and the certification itself is contained in the record at pages 17 and 18. The most cursory glance will show that none of the facts recited by the Court are contained in this certification and that, in fact, this certification does not even mention the Cosmetic Workers Union.

The further points listed in this title are not re-argued because their coverage in Petitioner's brief supporting the petition is sufficient in itself to dispose of any answer made thereto in the Board's brief. These other points are not de-emphasized however, and any one of them is sufficient for a reversal of the Court of Appeals.

The enormity of the error of the decision of the Board and Courts of Appeal are of such nature and conflicting import with the decisions of this Court and other circuits that certiorari should be granted.

Dated September 26, 1949.

Respectfully submitted,

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CLERK

IN THE

Supreme Court of the United States

October Term, 1949.
No. 225

THE ANDREW JERGENS COMPANY, a corporation,
Petitioner,

vs.

NATIONAL LABOR RELATIONS BOARD,
Respondent.

PETITION FOR REHEARING AFTER ORDER DENYING PETITION FOR WRIT OF CERTIORARI.

(Pages 1 to 8)

BRIEF ACCOMPANYING PETITION.

(Pages 9 to 18)

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To the Honorable Fred M. Vinson, Chief Justice, and to the Honorable Associate Justices of the Supreme Court of the United States:

Your Petitioner, The Andrew Jergens Company, a corporation, respectfully petitions that a rehearing and a reconsideration be given its petition for a writ of certiorari, which petition was denied by order of Court on October 10, 1949. Your Petitioner respectfully shows:

I.

On September 27, 1948, the United States Court of Appeals for the District of Columbia issued its decision in the case of National Labor Relations Board, Petitioner, v. Maurice Eanet, doing business as Parkside Hotel and Parkside Hotel, Inc. (a corporation), Respondents, in Case No. 9792. The said decision, in a manner more specifically described hereinafter in the accompanying brief, was in conflict with the decision of the Court of Appeals for the Ninth Circuit in the instant case, in that the decision of the Court of Appeals for the District of Columbia held, as Petitioner contended in the Court of Appeals for the Ninth Circuit and in this Court, that since at that time it could not be said that the union with which the employer was ordered to bargain continued to represent a majority of the employees, the order to bargain with that union would not be enforced until the National Labor Relations Board took further action therein to determine the question of representation. Thereafter, the said Court of Appeals for the District of Columbia granted a petition for rehearing and vacated its decision. The rehearing was thereafter held, but at the time of writing this petition, the said Court of Appeals for the District of Columbia has not issued any decision therein. A copy of the decision of the said Court of Appeals in the aforementioned case is attached to the brief accompanying this petition as Appendix "A".

II.

As is more particularly described in the brief accompanying this petition, the National Labor Relations Board in its instant decision found that the Petitioner had refused to bargain in good faith with respect to the sole issue of union security, although it bargained in good faith on all other terms and conditions of employment proposed by the Union. The Board also found a further unfair labor practice in a wage increase given to the employees, which was found to have been made without prior negotiation with the Union representative. The Board thereupon issued an order requiring Petitioner to:

"1. Cease and desist from:

(a) Refusing to bargain collectively with General Warehousemen's Union, Local 598, of the Teamsters, Chauffeurs, Warehousemen and Helpers, affiliated with the American Federation of Labor, as the exclusive bargaining representative of all production and maintenance employees at the Burbank, California, plant of the respondent, including janitors, truck drivers, and maintenance leadmen, but excluding watchmen, office employees, shipping clerks, maintenance foremen, production supervisors, production assistant supervisors, and all other supervisors;

(b) Unilaterally changing wages which would affect employees in the aforesaid appropriate unit without prior negotiation with General Warehousemen's Union, Local 598, of the Teamsters, Chauffeurs, Warehousemen and Helpers, affiliated with the American Federation of Labor;

(c) In any manner interfering with the efforts of General Warehousemen's Union, Local 598, of the Teamsters, Chauffeurs, Warehousemen and Helpers,

affiliated with the American Federation of Labor, to bargain collectively with it, as the exclusive representative of its employees in the appropriate unit described above.

2. Take the following affirmative action which the Board finds will effectuate the policies of the Act:

(a) Upon request, bargain collectively with General Warehousemen's Union, Local 598, of the Teamsters, Chauffeurs, Warehousemen and Helpers, affiliated with the American Federation of Labor, as the exclusive bargaining representative of the employees in the unit set forth above, with respect to rates of pay, wages, hours of employment, or other conditions of employment, and if an understanding is reached, embody such understanding in a signed agreement;

(b) Post at its plant at Burbank, California, copies of the notice attached hereto and marked 'Appendix A'. Copies of said notice, to be furnished by the Regional Director for the Twenty-first Region, shall, after being duly signed by the respondent's representative, be posted by the respondent immediately upon receipt thereof and maintained by it for sixty (60) consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the respondent to insure that said notices are not altered, defaced, or covered by any other material;

(c) Notify the Regional Director for the Twenty-first Region in writing, within ten (10) days from the date of this Order, what steps the respondent has taken to comply herewith."

The Court of Appeals for the Ninth Circuit enforced the above order in full, despite the fact that Petitioner contended to both the Board and the said Court of Appeals that the scope of the order was too broad.

III.

On July 30, 1949, Petitioner filed herein its petition for a writ of certiorari to review the decision of said Court of Appeals for the Ninth Circuit. The said petition and supporting brief were served upon Respondent on August 8, 1949.

On September 14, 1949, Respondent filed in this Court its brief in opposition to the aforementioned petition for a writ of certiorari. The said brief of Respondent was filed in contravention to Rule 38(3)(a) of the Revised Rules of the Supreme Court of the United States.

The said brief of Respondent was received by Petitioner on September 19, 1949.

Petitioner, acting as expeditiously as possible, prepared and filed herein, on September 28, 1949, at 6:05 P. M., its brief in reply to the said brief of Respondent.

On October 10, 1949, this Honorable Court issued its order denying the said petition for a writ of certiorari.

The facts recited in this paragraph III were not learned by Petitioner until after service upon it of the order of this Court denying its petition for a writ of certiorari.

The said brief of Respondent contained many gross errors in statements of fact and holdings of cases of this Court, which errors were pointed out in the brief of Petitioner in reply thereto.

IV.

The Court of Appeals of the Ninth Circuit, on October 18, 1949, isssued its mandate against this Petitioner, enforcing the aforementioned order of the National Labor Relations Board.

Statement of Grounds Urged in This Petition.

I.

That in view of the pendency of a similar action in the Court of Appeals for the District of Columbia, which Court previously reached a conclusion in said pending action which is in conflict with the decision of the Court of Appeals for the Ninth Circuit in the instant case, the question of the effect of the loss of majority status of the Union is one of great importance in the administration of the Labor Management Relations Act, which should be determined by this Court.

II.

That the order of the National Labor Relations Board, enforced in full by the Court of Appeals for the Ninth Circuit in the instant case, is of a breadth beyond that which this Court has recently held may be issued in the circumstances of this case.

III.

That the brief of Respondent, having been filed herein beyond the time permitted by the Rules of this Court, should be stricken from the record of this matter, or in the alternative, and especially in view of the fact that a full court could not have considered Petitioner's brief in reply to the said brief of Respondent, Petitioner fears that the order of this Court denying its petition for a writ of certiorari, issued a short time after the filing of the said reply brief, had not received the attention of this Court at the time of issuing said order.

Wherefore, Your Petitioner Prays that a rehearing be granted and that a writ of certiorari issue under the seal of this Court, directed to the Court of Appeals of the United States for the Ninth Circuit, to the end that the proceedings of said Court in this cause may be reviewed and determined by this Court, as provided for by the Statutes of the United States; and that the judgment of said Court of Appeals be reversed; and that the mandate of the said Court of Appeals, which issued against petitioner on October 18, 1949, be revoked and stayed, pending the determination of this petition and the petition for a writ of certiorari; and for such further relief as the nature of the cause may require and the Court may deem proper in the premises.

Dated, October 21, 1949.

Respectfully submitted,

THE ANDREW JERGENS COMANY,
a corporation,

By HOMER D. CROTTY,
Attorney for Petitioner.

GIBSON, DUNN & CRUTCHER,
J. STUART NEARY,
FRANK MERGENTHALER,
Of Counsel.

Certificate of Counsel.

It is hereby certified that the above petition for rehearing is presented in good faith and it is the honest, sincere and earnest belief of counsel that the contents thereof are worthy of the consideration of this Court; that it is not filed for the purpose of delay; and counsel further certifies that this petition is restricted to grounds which are confined to circumstances coming to the attention of Petitioner subsequent to the filing of its petition for a writ of certiorari or to other substantial grounds available to Petitioner although not previously presented, except that the second ground urged herein was, to a small and inconsequential extent, called to the attention of this Court in a petition for a writ of certiorari, and the said ground is herein for the first time given full consideration.

HOMER D. CROTTY,

Attorney for Petitioner.

IN THE

Supreme Court of the United States

October Term, 1949.

No. 225

THE ANDREW JERGENS COMPANY, a corporation,

Petitioner,

vs.

NATIONAL LABOR RELATIONS BOARD,

Respondent.

BRIEF IN SUPPORT OF PETITION FOR REHEARING.

I.

The Question of the Effect of the Loss of Majority Representation by the Union With Which Petitioner Is Ordered to Bargain Is One of Great Importance in the Administration of the Act, as Is Evidenced by Pending Cases in the Courts of Appeals.

The Court of Appeals below in the instant case stated in its decision:

> "In its answer to the Board's petition for enforcement of its order, respondent alleges that since prior to January 1, 1948, none of its employees were members of the Teamsters. The Board admits the truth of this allegation in its brief." [R. 567.]

Despite the fact that it was also admitted that the Board did not give any consideration to such loss of majority status, but, on the contrary, erroneously assumed that the Union did represent a majority of employees (See: Petitioner's Reply Brief, p. 2, and references to record therein contained), the Court of Appeals held that such loss of majority status was not a bar to enforcement of the order to bargain and that it could be conclusively presumed that such loss was due to unfair labor practices. That was held by the Court below, although such unfair labor practices, if any, had occurred almost three years before the loss of majority representation became evident. This was held in the face of Petitioner's petition to adduce additional evidence relating to the loss of majority status.

In contrast and in conflict with the reasoning of the Court of Appeals below is a decision of the Court of Appeals for the District of Columbia in the case of *National Labor Relations Board v. Maurice Eanet,* No. 9792, decided September 27, 1948. In that case two years had elapsed between the occurrence of the unfair labor practice and the decision of that Court. (This is to be contrasted with the period of time in the instant case which was over three years between the commission of any unfair labor practice and the decision of the Court of Appeals for the Ninth Circuit.) In view of the delay of two years, and even in the absence of any petition to adduce additional evidence on the part of the employer, or any allegation on the part of the employer with respect to the union's majority status, the Court of Appeals for the District of Columbia held that the order to bargain could not be enforced as it felt that due to the lapse of that period of time a redetermination must be made as to whether the union represented a majority of the employees.

The facts in that case are different from the instant case to a small extent as the facts of all cases differ. However, here at least is one court which does not apply any conclusive presumption as to the cause of the loss of majority status by a union. It is respectfully submitted that the decision given by that Court cannot be reconciled with that of the Court below in the instant case.

The Court of Appeals for the District of Columbia, vacated the aforementioned decision and a rehearing was held. No further decision has been rendered although over a year has elapsed. The opinion referred to is reproduced in full and attached hereto as Appendix "A."

The matter of *National Labor Relations Board v. Maurice Eanet, supra,* was cited to this Court in the petition for a writ of certiorari and in the brief attached thereto as being in conflict with the decision of the Court below in the instant case. Citation was made to Labor Cases (an unofficial Reporter), and it was not realized at that time that the decision had been vacated. In view of the fact that that case is still pending, and especially in the light of that Court's reasoning in its vacated decision, it is the honest desire of counsel to call this Court's attention to that case as it reveals the extent to which the question of the effect of loss of majority status is still an undetermined question, and the order of this Court, in denying Petitioner's petition for a writ of certiorari, will no doubt have a strong impact upon that case. It is indeed sincerely felt that the pendency of a similar case in another Circuit, which Circuit has revealed that it is not inclined to agree with the Court of Appeals for the Ninth Circuit in this case, is alone sufficient grounds for this Court to give reconsideration to Petitioner's petition for a writ of certiorari and grant a hearing in the instant case.

II.

The Order of the Board Enforced by the Court Below Is Too Broad in Its Scope, in That It Prohibits Petitioner Under Penalty of Contempt From the Doing of Acts Which Have Not Been Found to Have Been Threatened.

The Board found that Petitioner had refused to bargain on the sole issue of union security and by the giving of a unilateral wage increase. There was no evidence nor was there, of course, any finding that Petitioner was an employer who had not accepted the principle that employees had the right to collectively organize and bargain. The decision of the Board, as well as the Court, is explicit that on all issues other than union security the parties were in agreement [R. 26, 28, 30, 32, 36, 105, 109], and from that it is clear that on all such other issues Petitioner was bargaining in good faith. The unfair labor practices found, therefore, relate to a single issue of the many issues which go into the meaning of a collective bargaining agreement, with the single addition of the unilateral wage increase.

It is earnestly submitted that such conduct does not at all evidence that this Petitioner is threatening the acts which the order enforced in the instant case would prohibit under penalty of contempt.

The order prohibits under such penalty any act which may subsequently be determined to have been a refusal to bargain, or to be an interference with the efforts of the Union to bargain with Petitioner. If the Petitioner refused to meet with a certain individual as representative

of the Union because that individual was obnoxious to Petitioner, though offering at all times to meet with any other person whatsoever as representative of the Union, the Petitioner would be committing the technical unfair labor practice of refusing to bargain.

It is submitted that there could be no debate over the proposition that if the order enforced in the instant case expressly prohibited Petitioner from engaging in that type of refusal to bargain, that this Court would not permit it to stand since there is not a scintilla of evidence any where in the record that Petitioner's conduct in the past could be the basis for the expectation of such conduct in the future. Yet if Petitioner engaged in such conduct, it would just as clearly be in violation of paragraph 1 (a) and 1 (b) of the instant order, as set out in the petition and in the record at 110-114.

Another example is that Section 2 (a) of the order requiries Petitioner, in the event an agreement is reached, to embody such agreement into a signed contract. There is no suggestion any where in the record that Petitioner has ever refused to put any agreement in writing, and, in fact, this section of the order becomes ridiculous when it is realized that in this case it was the Petitioner who urged upon the Union at the bargaining conference of January 17, 1946, to embody the terms upon which they had reached agreement into a contract. [R. 26, 32, 36, 37.] Far from there being any evidence in the record that Petitioner threatened to engage in such a refusal, there is, in fact, evidence in the record that Petitioner

desires to do that which the order requires him to do. It is submitted, however, that Petitioner's willingness to comply with the order should not be taken by the Board as its authority to put it under the threat of contempt with respect thereto. Other cases of the various types of refusal to bargain could likewise be given, all of which would be in contravention of the order in this case, no evidence of any of which is any where in the record.

This Court recently considered an order which was identical with the order in the instant case and held that it must be modified as its scope enjoined things as to which the record showed no threats on the part of the employer to engage in. The case of *National Labor Relations Board v. Crompton-Highland Mills, Inc.*, 93 L. Ed. 918, involves the unfair labor practice of a unilateral wage increase in an amount which was in excess of that previously negotiated with the union. This Court held that the order must be modified so as to prohibit the employer from only engaging in the specific acts found to have been violations of the rights of employees. In the instant case the only additional feature which exists is the finding of a refusal to bargain on a single issue of union security, accompanied by a complete willingness to bargain on all other terms and conditions of employment and, in fact, agreement on all such other terms and conditions.

It is, therefore, submitted that the decision of this Court in the *Crompton-Highland Mills, Inc.*, case requires that the order in the instant case be remanded to the Court of Appeals for the Ninth Circuit in order to at least be

modified so as to prohibit Petitioner from committing only the two isolated unfair labor practices which have been found, that is, with reference to union security and with reference to a unilateral wage increase.

This Court stated in the *Crompton-Highland Mills, Inc., case,* 93 L. Ed. 918:

> "The precise issue presented is what decree, if any, should be issued by the Court of Appeals for the enforcement of the order of the National Labor Relations Board. If a decree is to be issued, its scope and terms should be based upon such part, or all, of the Board's cease and desist order as is supported by its findings of fact." (p. 920.)
>
> "We hold that the Board's order to cease and desist is justified, under the circumstances of this case, to the extent that the order requires the employer to cease and desist from refusing to bargain collectively by taking action, without prior consultation with the authorized collective bargaining representative of the employees, with respect to general rates of pay which are substantially different from, or greater than, any which the employer has proposed during its negotiations with such representative." (p. 922.)
>
> *"The decree of enforcement should not extend further than necessary to prevent the taking of the prohibited action by the employer.*
>
> "There are no findings by the Board that establish a lack of good faith or lack of consistency with the principle of collective bargaining on the part of the employer other than in the connection above discussed." (p. 923; Emphasis that of Court.)

In the instant case the Board makes no statement as to why the order it issued must be of the scope in which it is formed. The Intermediate Report of the Trial Examiner [R. 48] states that "As there is no evidence of the danger of the commission of unfair labor practices" other than those found to be anticipated from Petitioner's conduct, an order to cease and desist from other unfair labor practices is not recommended.

It is submitted that the distinction in form, nature and effect between the various types of refusal to bargain is in many cases comparable to the distinctions in other unfair labor practices not found to be committed.

The question, of whether Petitioner's conduct is such as to justify the order in the instant case, should be viewed in the light of the fact that a strike occurred at Petitioner's plant in February of 1946, which lasted for several months thereafter, and that during the existence of that strike there was no conduct on the part of Petitioner which in any way interfered with the rights of the employees to engage in such activity.

It is submitted, therefore, that the conduct of Petitioner, as disclosed in this case, is within the principle enunciated by this Court in the case of *National Labor Relations Board v. Crompton-Highland Mills, Inc.*, 93 L. Ed. 918, and the matter should be remanded to the Court of Appeals for the Ninth Circuit so as to modify its order enforcing the order of the Board consistent with the principles of that case.

III.

In View of the Conduct of the National Labor Relations Board, Respondent Herein, In Filing Its Brief Beyond the Permitted Time, and the Decision of the Court at an Early Date Shortly Thereafter the Reply Brief of Petitioner Should Be Reconsidered.

As stated in the petition, the brief of Respondent herein was filed September 14, 1949. Rule 38(3)(a) of the Rules of this Court provide:

> "If the date for filing a brief in opposition falls in the summer recess, the brief may be filed within forty days after the service of the notice, but this enlargement shall not extend the time to a later date than September 10th."

Petitioner received a copy of said brief of Respondent on September 14 and was unable to file its reply thereto until the evening of September 28, a Thursday. The order of this Court denying the petition for a writ of certiorari was issued October 10. At the time of filing said reply brief and at the time of the issuance of the said order, a full Court was not present. The brief of Respondent, as pointed out in Petitioner's reply brief, contained gross and misleading statements of a nature which required consideration of such a reply brief for the proper assistance of the Court.

The Court is, therefore, respectfully requested to reconsider this reply brief as Petitioner fears that the ruling of this Court issued on October 10, 1949, has been made

without sufficient time for consideration of the reply brief of Petitioner, inasmuch as that brief was received by the Court only a few days before that ruling.

Dated October 21, 1949.

All of which is respectfully submitted,

HOMER D. CROTTY,
Attorney for the Andrew Jergens Company, Petitioner.

GIBSON, DUNN & CRUTCHER,
J. STUART NEARY,
FRANK MERGENTHALER,
Of Counsel.

APPENDIX A.

National Labor Relations Board, Petitioner, v. Maurice Eanet and Ben Rich, as Individuals and Co-Partners Doing Business as Parkside Hotel, and Parkside Hotel, Incorporated (a Corporation), Respondents.

United States Court of Appeals, District of Columbia. No. 9792. September 27, 1948.

On Petition for Enforcement of an Order of the National Labor Relations Board.

Robert Todd McKinlay (David P. Findling, Associate General Counsel, Ruth Weyand, Acting Assistant General Counsel, and Ben Grodsky, on the brief), all of the National Labor Relations Board, Washington, D. C., for Petitioner.

William H. Collins, Washington, D. C., for Respondents.

Before STEPHENS, Chief Justice, and MILLER and PRETTYMAN, Associate Justices.

PRETTYMAN, A. J.: This is a petition of the National Labor Relations Board for the enforcement of an order issued by it against the respondents. The Board found the respondents to be engaged in unfair labor practices and to have refused to bargain with a union of employees. It ordered the respondents to cease and desist from warning their employees to refrain from membership in any labor organization; threatening to discharge such employees because of their activities on behalf of any labor organization; questioning the employees concerning their membership in and activities on behalf of any labor organization; ordering such employees "to take vote as to

whether they desire to be represented by Hotel Service Workers, Local 80, A. F. of L., or any other labor organizations;" and interfering with the efforts of Hotel Service Workers, Local 80, A. F. of L., to negotiate for or represent employees. The Board also directed the respondents to post notices in a prescribed form and "Upon request, bargain collectively with Hotel Service Workers, Local 80, A. F. of L., as the exclusive representative of all its employees in the aforesaid appropriate unit, * * *."

The bargaining unit involved in this case consisted of the "bellmen, maids, elevator operators, janitors, housemen, and cleaners" employed at the respondent's hotel. There were either nine or ten[1] of these employees in the unit. The union established that it had been designated as the collective bargaining representative by six of these employees.

The charge of unfair labor pracice rested upon a statement alleged to have been made by a housekeeper to a bellboy, to the effect that if the maids under her supervision joined the union, she would discharge them. The housekeeper made an affidavit to that effect, but on the witness stand she testified that she and the bellboy were "kidding" and that she said, "I am not going to join the union" and could not remember saying anything further. Counsel for the Board thereupon pleaded surprise and produced the affidavit given by the housekeeper to a field examiner. She then said that the affidavit was correct. The bellboy was not called as a witness. The charge of

---

[1]The Board's report states that there were ten employees, but the payroll introduced in evidence showed nine, five maids, three bellboys and one houseman.

interference with employees in the exercise of their rights (violation of Section 8 (1) of the Act[2]) rested upon action taken by the manager of the hotel. Agents of the union called upon him with cards purporting to show that the union represented a majority of the employees. Some discussion was had, and the union representatives and the manager executed an instrument called an "Agreement for Cross-Check". Pursuant to that agreement, a notice concerning the cross-check was posted. Thereafter the employees took a vote, apparently among themselves, and turned the ballots over to the manager. These ballots, according to the manager, were unanimous against representation by the union. Thereafter there ensued a long discussion in which the respondents refused to bargain with the union, on the ground that the union did not represent the employees. The manager testified at the hearing that at the time the cross-check was proposed the field representative of the Board told him that the employer had a right to cross-check; that he inquired what a cross-check was and was told that it was "a revote on it"; and that the field representative told him that after the agreement was signed, "Then you post a notice downstairs for five days, and then you take a vote." The manager said that they followed these precise instructions. He said:

> "I never infoenced [*sic*] them one way or another, but I did post the notice five days, and I thought that someone was going to come in and ask what happened, but nobody showed up at the end of the five days, and I took the notice down. They made the

[2]49 Stat. 452 (1935), 29 U. S. C. A. §158(1).

vote among themselves, one of their representatives did, and they unanimously voted against it. I wrote in to Baltimore and told them that the vote seemed negative, that they weren't interested, and I got a letter back saying that the union had been designated as the representative to bargain."

It would appear from the decided cases that if the housekeeper made the threat of discharge, and if the manager ordered and took the poll of the employees in the manner described by the Board, respondents would have been guilty of violation of the Act. Thus, the case on the merits would depend upon the sufficiency of the evidence to support the findings. But we think that this particular case requires other disposition.

We think that the dates involved in this proceeding are important to the disposition of the case. The controversy between the union the respondents occurred in April, 1946, which was more than two years ago. The hearing was had August 6, 8 and 9, 1946. The trial examiner issued his intermediate report, which contained his findings of fact and recommendations, on October 18, 1946. The Board issued its decision and order, approving the trial examiner's report, on July 31, 1947, which was nine months later. It filed its petition in this court, for enforcement of its order, on March 10, 1948.[3]

In sum total, therefore, we have a case which involves a controversy as to whether six out of nine or ten employees of a small hotel wished more than two years ago to be represented by a designated union. No election

---

[3]The respondents' brief was filed May 28, 1948.

has ever been held. It is common knowledge that the personnel, such as bellboys, elevator operators, maids and janitors of small hotels constantly changes. The Board asks us not only to require these respondents to refrain from interfering with their employee's joining this one named Local 80 but also to require them to bargain collectively with that named Local 80. The latter requirement is unqualified and unlimited as to time.

An enforcement order of this Court is a serious exercise of judicial power and once such an order is issued, we intend it to be observed, literally and without equivocation. We feel that we must take a realistic view of the present case. There would be nothing realistic, in our view, in directing these respondents to bargain collectively with a named union on the basis of a showing that more than two years ago the union had been selected by six out of nine or ten bellboys, maids and a houseman in this small hotel. We, therefore, decline to issue the enforcement order.

If it be that the conditions found to have existed in April, 1946, continue to exist, the Board can easily bring its information up to date. If the employees wish to organize, or if the union claims to represent a majority, an election ought to be requested.

Upon the foregoing conditions, the petition of the Board is denied.

STEPHENS, Ch. J.: I think there is evidence to support the finding of the Board that the respondents' housekeeper threatened discharge of employees if they joined a union and evidence to support the finding that respondents' manager took a poll of the employees to determine whether or

not they desired to be represented by Local 80, A. F. of L. I think also that the authorities support the conclusion of the Board that such acts constitute violations of Section 8 (1) of the National Labor Relations Act. In my view, therefore, a decree should be issued enforcing the Board's cease and desist order to the extent that it forbids such practices. But I agree with the conclusion of the majority that the Court should not on the present record issue a decree enforcing that portion of the Board's order which requires the respondents to bargain collectively with Local 80, A. F. of L.

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IN THE

Supreme Court of the United States

October Term, 1949.

No. 225.

THE ANDREW JERGENS COMPANY, a corporation,
Petitioner,

vs.

NATIONAL LABOR RELATIONS BOARD,
Respondent.

SUPPLEMENTAL BRIEF IN SUPPORT OF PETITION FOR REHEARING.

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IN THE

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No. 225.

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Respondent.

SUPPLEMENTAL BRIEF IN SUPPORT OF PETITION FOR REHEARING.

Statement.

The Court of Appeals for the Ninth Circuit enforced an order of the National Labor Relations Board against the Petitioner which required the Petitioner to bargain with the named Union despite the fact that subsequent to the decision and order of the Board it was determined that the Union did not represent any employees of Petitioner. This fact was brought to the attention of the Court of Appeals and was in fact admitted by the Respondent, the National Labor Relations Board, and such admission is recited in the Court's opinion [R. 567]. It was also admitted that the Board had not given any consideration to this loss of majority, but had found upon evidence taken more than three years before that the Union did represent the employees of the Petitioner.

Thereafter, Petitioner filed in this court a Petition for Certiorari which was denied on October 10, 1949. Subsequent thereto Petitioner filed herein a Petition for Rehearing of said order and urged as a grounds the pendency of a similar case (*National Labor Relations Board v. Maurice Eanet*) in the Court of Appeals for the District of Columbia, which Court had previously issued a decision in conflict with that of the Court of Appeals of the Ninth Circuit in the instant case. That decision of the Court of Appeals of the District of Columbia had at that time been vacated and a rehearing granted, and this Court was urged to reconsider Petitioner's Petition for Certiorari and hold the matter under advisement pending a redetermination by the Court of Appeals for the District of Columbia. The copy of the vacated decision of the latter court was attached to the brief accompanying the Petition for Rehearing and marked Appendix A.

Since the filing of that Petition for Rehearing the Court of Appeals for the District of Columbia on October 31, 1949, again issued its decision in the case before it, reaffirming and reinstating its original decision. That court also issued a supplemental opinion which is attached to this brief as Appendix. It is the position of Petitioner herein that the decision of the Court of Appeals for the District of Columbia in that case is in direct conflict with the decision of the Court of Appeals of the Ninth Circuit in the instant case and, therefore, affords new grounds for the granting of a Petition for Certiorari.

A Writ of Certiorari Should Be Directed to the Court of Appeals for the Ninth Circuit Inasmuch as the Decision of That Court Is in Conflict With a Recent Decision of the Court of Appeals of the District of Columbia.

In the instant case the Board has consumed a period of three years from the time of the only hearing to the enforcement of its order. The Court of Appeals for the Ninth Circuit was urged by a proper Petition to adduce evidence and Answer that the order of the Board should not be enforced due to intervening and changed circumstances which consisted of the fact that the Union involved no longer represented any employees of the Petitioner. The decision of the Court of Appeals was that such matter was irrelevant and Petitioner would be required to bargain with such a non-representative Union despite its loss of majority representation, despite the further fact that the Board had not considered such loss of majority nor determined the causes of the loss of majority, and in the face of the fact that the Board had even expressly assumed in issuing its order that the Union represented a majority of Petitioner's employees.

In *National Labor Relations Board v. Maurice Eanet*, Court of Appeals for the District of Columbia, No. 9792, the court originally issued a decision which held that since two years had elapsed between the time of the hearing and the Petition for Enforcement it could no longer assume that the Union with which the employer involved therein was ordered to bargain represented the employees of the employer and, therefore, would not enforce the order until such a redetermination of representation was made. That decision was vacated, and a re-

hearing was granted and a supplemental decision was issued October 31, 1949, which reached the same result, and which is reproduced in Appendix of this brief. That supplemental opinion states:

> "The opinion, order and decree of this court of September 27, 1948, which were vacated March 1, 1949, for the purposes of the rehearing, are hereby reinstated and, as supplemented by this opinion, are made the opinion, order and decree of the court." (Appendix, p. 13.)

The supplemental decision together with the original decision which was reinstated makes it clear that the decision in that case is in conflict with the decision of the Court of Appeals in the instant case.

The decision in the instant case of the Court below stated:

> "It seems to us there is further support for the enforcement of the Board's order in the known and established policy of the National Labor Relations Board in dealing with like cases. In the Karp Metal case, 51 N.L.R.B. 621, the Board, in a similar situation, stated that it was its firm policy to assume that any losses of membership which are concurrent with or subsequent to unremedied unfair labor practices are results of such practices. In forming this policy the Board admits that some losses may be motivated by other factors, but considers it impossible to disentangle them so long as the refusal to bargain stands. See also, Pure Oil Co., 62 N.L.R.B. 1039, 1044, 1045. It would be useless to remand this case to the Board for findings on this matter, since the order in the instant case applies this policy to the facts as respondent has presented them to us."

This is to be contrasted with a similar position on the part of the Board in the *Maurice Eanet* case which the Court of Appeals for the District of Columbia found unacceptable. The decision in that case states:

> "We granted the motion, suggesting that a motion to remand for receipt of later and fresher evidence would be entertained. The Board rejected the suggestion, its counsel stating flatly in their brief on rehearing. '. . . the Board has authorized us respectfully to advise this Court that if a motion to remand the case to the Board were granted, the Board would feel compelled, upon the basis of its prior decisions, to reaffirm its order directing respondents to bargain.' And later in their brief they said: 'In the light of this well-settled doctrine, the Board has, as we have noted, authorized us to advise this Court that if the case were to be remanded to the Board, the Board would adhere to its previous order.' And again they said: 'Since the Board upon a remand of the case would adhere to its prior order, it follows that no good purpose would be served by remanding the case to the Board.' Thus, the Board declines our suggestion, and we are limited to the record as originally made, of events which occurred in the spring of 1946." (Appendix pp. 6-7.)

The Court of Appeals for the District of Columbia in refusing to accept such a stereotyped method as a substitute for evidence clarifies the scope of its original decision so as to make it clear that while it did not decide whether the Union did or did not still represent the employees involved it felt that due to the lapse of time it could not assume that any of the facts found by the Board still existed, among them the question of whether

the Union did in fact represent the employees. That court also made it clear that where that question is raised the order to bargain cannot be enforced until a redetermination of representation has been made by the Board. In its supplemental decision in the *Maurice Eanet* case that Court stated:

> "We held, and we hold, on the basis of the whole record before us, that an enforcement decree ought not to be entered in this case in the absence of any showing whatever, based on reasonably recent inquiry, that a decree of court is appropriate or necessary." (Appendix, p. 11.)
>
> "Substantial considerations support the view that the court should require some reasonably recent indication that a decree is warranted." (Appendix, p. 9.)
>
> "The courts cannot, of course, refuse to issue enforcement decrees where the Board has found facts and reached conclusions which indicate that, in accordance with its judgment, enforcement is presently appropriate. But surely enforcement must appear to be presently desirable before the solemn power of the courts is brought to bear upon the dispute." (Appendix, pp. 9-10.)
>
> "Moreover, entry of decrees unrelated to present reality is not countenanced by our jurisprudence. In an ordinary law suit of the magnitude of the case at bar, we venture to say that no court would enter a mandatory or injunctive decree on data two years old." (Appendix, p. 10.)

The conflict of that case with the instant case is made especially clear by the dissenting opinion therein of Chief Judge Stephens wherein he cites the instant case (Appendix, p. 18) in support of his argument that the question of loss of representation occurring after the order of the Board is not material in a proceeding for enforcement. It should also be noted that he cites in the same reference cases relied upon by the Court of Appeals for the Ninth Circuit in the instant case as well as relying strongly upon the decision of this court in *Franks Bros. Co. v. National Labor Relations Board,* 321 U. S. 702, which also was relied upon by the Court of Appeals for the Ninth Circuit. The instant case and the cases relied upon by the instant case, are, therefore, urged by Chief Judge Stephens in his dissenting opinion in the *Maurice Eanet* case as being contrary to the decision of the count in that case on the question of the effect of lapse of time between the hearing before the board and the petition for enforcement, and the resulting effect upon the question of representation by the union. Surely then there is conflict and the grossest confusion over the question of the effect of intervening circumstances upon the enforcement of an order of the National Labor Relations Board.

Conclusion.

The decision of the Court of Appeals in the instant case is in direct conflict with the decisions of the several circuits as set out in the original Petition for Certiorari and accompanying brief. This conflict is broadened in the recent decision of the Court of Appeals for the District of Columbia and the conflict and confusion among the circuits arises from the varying constructions placed upon the decision of this court in *Franks Bros. Co. v. National Labor Relations Board,* 321 U. S. 702. It is, therefore, earnestly and respectfully submitted that the decree of the Court of Appeals for the Ninth Circuit enforcing the order of the National Labor Relations Board should be vacated and that a Writ of Certiorari should be directed to that court to review its decision.

Dated: November 1, 1949.

Respectfully submitted,

HOMER D. CROTTY,

Attorney for the Andrew Jergens Company, Petitioner.

GIBSON, DUNN & CRUTCHER,
J. STUART NEARY,
FRANK MERGENTHALER,
Of Counsel.

APPENDIX.

United States Court of Appeals, for the District of Columbia Circuit. No. 9792.

National Labor Relations Board, Petitioner v. Maurice Eanet and Ben Rich, as Individuals and Copartners doing business as Parkside Hotel and Parkside Hotel, Inc., a Corporation, respondents.

On Rehearing.

Rehearing March 28, 1949—Decided October 31, 1949 before Stephens, C. J., and Wilbur K. Miller and Prettyman, J. J.

PRETTYMAN, *J.*: The Board argues that our decision in this matter rested upon the possibility or probability that the Union had lost its majority of respondents' employees between the time of the dispute and the time of submission to the court. Our decision was not upon that basis. We did not know and did not assume or speculate that the Union had lost its majority. To correct the misapprehension, we state again our opinion and decision.

Before we do that, however, we note the rule which the Board itself says is applicable to the hotel industry. The latest announcement by the Board on this subject is *In the Matter of White Sulphur Springs Company,* Case No. 9-RC-392, decided September 19, 1949. The hotel there involved was a nationally known resort hotel owned and operated by the Chesapeake & Ohio Railroad, having, as is commonly known, a large number of employees and making

large purchases in interstate commerce. In that decision and order, the Board said:

"The Employer contends that it is not engaged in commerce within the meaning of the Act. Although the Employer's operations are not wholly unrelated to commerce, it appears that a cessation of this Employer's operations would have such a remote and indirect effect on commerce that to assert jurisdiction here would not effectuate the policies of the Act.

"To assert jurisdiction here would be to reverse Board precedent untouched since the original Wagner Act was enacted 14 years ago. We can find no adequate reason to depart from a practice adhered to administratively by our predecessors and ourselves since 1935. Nothing in the legislative history of the present Act indicates dissatisfaction by the Congress with the Board's long-standing policy. Indeed, the absence of mention of this industry in the hearings or debates leading to the 1947 amendments to the original Act indicates a disposition not to question or disturb the Board's policy."

The case at bar concerns a very small hotel located in the heart of downtown Washington, with ten employees. Nevertheless, the trial examiner concluded, and the Board approved the conclusion, that the activities of this hotel "have a close, intimate, and substantial relation to trade, traffic and commerce within the District of Columbia, and tend to lead to labor disputes burdening and obstructing such commerce and the free flow of commerce." We cannot refrain from viewing this conclusion, in respect to this small local hotel, in the light of the general policy which the Board says it has followed in respect to hotels since

1935 and has applied to so great an operation as that of the Greenbrier at White Sulphur Springs.[1] If the cessation of the operation of the Greenbrier Hotel would have a negligible effect on commerce, it is difficult to see how the cessation of operation of the Parkside Hotel would have a substantial effect on commerce.

The dispute in the case at bar arose in April, 1946, when two business agents of a labor union appeared before the manager of the Parkside Hotel and said that by designation of six bellboys and maids the Union was the bargaining representative of the ten employees in that category. The testimony as to these conversations is confused and conflicting. One of the agents testified that the manager started to make an antagonistic remark but then restrained himself and said that he had no objection to the employees' Union. This witness said, however, that the manager's wife, who was the switchboard operator, repeatedly interrupted the conversations and made declarations of hostility toward unions. The other agent attributed these declarations to the manager himself. Several similar conversations occurred. Important in the controversy at that point was the fact that two bellboys who belonged to the Union had been discharged. But it was later established, apparently to everyone's satisfaction, that one was fired for repeatedly being drunk on the job and the other for giving the room numbers of lady guests to guest

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[1]Examination of the published indexes and digests of National Labor Relations Board decisions fails to reveal any other decision upon the policy of the Board in respect to its jurisdiction in the hotel industry, except In the Matter of Willard, Inc., 2 N. L. R. B. 1094 (1937), in which the Board exercised its jurisdiction in a case involving the discharge of employees for union activities, and in which this court issued an enforcement decree (68 App. D. C. 372, 98 F. 2d 244 (1938).)

sailors, and so that phase of the original trouble disappeared from the case. In any event, the Union filed charges with the Board, and a field representative of the Board called upon the manager. He asked the manager to sign an "agreement for cross check." The manager signed it and gave the Board representative the current payroll as a list of the employees. At this point there is further confusion. The manager testified that he asked what a "cross check" was and was told that it was a recount or re-vote, and he understood that it meant that the employees were to vote again. The field examiner left the hotel and called on one of the owners. This owner testified that he told the examiner that the manager had no authority to sign the agreement but that the whole matter would be handled by counsel, whom he then called and who made an appointment with the examiner. This field examiner was not called as a witness at the subsequent hearing, and counsel did not testify.

Some time after the interviews above described, the manager received written instructions from the Board to post for five days a printed notice, enclosed, and a copy of the agreement for cross check, also enclosed. The agreement recited that after the five-day posting period, "if the Regional Director is of the opinion that no valid cause to the contrary has been shown," he would issue a "Report on Cross-Check" finding that the Union had been designated. The manager posted the notice and at the end of the five days wrote the field examiner of the Board:

"The attached notice has been posted for five days, and it appears that the employees are not interested.

"Awaiting your further word, I remain,

"Respectfully yours,

_____ _____."

It appears that during the five days a vote of the employees (the manner being a disputed point in the case) was taken and the ballots given to the manager. These ballots were the basis for the statement in his letter. Without inquiring further of the manager, the Regional Director issued a Report on Cross-Check, reciting that "no valid cause has been shown why this Cross-Check should not constitute complete and final disposition of the question concerning representation."

The taking of the vote during the five-day period is one of the two unfair labor practices found by the Board. The manager testified that he told the employees that he understood they were supposed to vote but that how they voted was none of his business. No one testified to the contrary.

After the Report on Cross-Check, the Board, on July 13, 1946, issued a complaint, and a hearing was had. The trial examiner made his report, exceptions were filed, and the Board reviewed the report, adopted the findings, with some exceptions, and issued its decision and order. It found the owners of the hotel guilty of unfair labor practices, in that (1) the housekeeper had told a bellboy that if the maids joined the Union she would fire them; (2) the manager took a poll of the employees, and (3) the owners refused to bargain with the Union. The Board ordered the owners to cease and desist from (a) warning their employees to refrain from membership in a labor organization (this in spite of the trial examiner's finding that there was no evidence that the employers had so warned the employees) and (b) in any manner interfering with the efforts of Hotel Service Workers, Local 80, A. F. of L., to negotiate for or represent the employees. It directed

the employers to post various notices, which notices said, among other things, that the owners would not in any manner interfere with the efforts of Local 80 to represent the employees. The Board ordered the employers to bargain collectively with Local 80 as the exclusive representative of the employees.

On March 10, 1948, the Board filed its petition with this court. The petition recited jurisdictional facts, the entry of the Board's order, and the order verbatim, and prayed for a decree of enforcement. The petition contained no allegation that respondents had ignored or refused to obey the order of the Board. The record contains no facts of occurrences since the spring of 1946, and the petition recited none.

This court in a short opinion reflected its view that in a minor case of this sort the Board should bring its information up to date. Instead, the Board moved for a rehearing. We granted the motion, suggesting that a motion to remand for receipt of later and fresher evidence would be entertained. The Board rejected the suggestion, its counsel stating flatly in their brief on rehearing, ". . . the Board has authorized us respectfully to advise this Court that if a motion to remand the case to the Board were granted, the Board would feel compelled, upon the basis of its prior decisions and upon what it regards as controlling Supreme Court decisions, to reaffirm its order directing respondents to bargain." And later in their brief they said: "In the light of this well-settled doctrine, the Board has, as we have noted, authorized us to advise this Court that if the case were to be remanded to the Board, the Board would adhere to its previous order." And again they said: "Since the Board upon a remand of the case

would adhere to its prior order, it follows that no good purpose would be served by remanding the case to the Board." Thus, the Board declines our suggestion, and we are limited to the record as originally made, of events which occurred in the spring of 1946.

Our disposition of the case was upon consideration of the following features, not merely one of them alone but the composite. The incidents from which the controversy arose occurred two years before the Board brought its petition to this court. There was no later evidence. The dispute itself, even if established to exist as alleged, was utterly minor, about as significant as a street-corner brawl. There was no evidence of antagonism or obduracy on the part of the employers. At most, theirs was a state of confusion, which they sought to resolve by resort to counsel. There was no evidence of the slightest helpful response from any Board representative. The two alleged unfair labor practices were shown only by slight fractions of evidence, taken out of setting. The selectivity displayed by the finder of the facts was startling. The conclusions which the Board reached were confused and inconclusive in critical parts. The trial examiner, and later the Board by adoption, concluded that "The record contains no support for the allegation in the complaint that the respondents have 'urged, persuaded and warned' their employees to refrain from joining the Union." But at the same time it concluded that "respondents interfered with, restrained, and coerced their employees in the exercise of the rights guaranteed in Section 7 of the Act [collective bargaining]." That bellboys and maids in very small hotels are in the main a floating sort of labor is well enough known. Upon the rehearing we were advised that only one of the

employees at the hotel in 1946 is still there. In sum, this was a very insignificant, very doubtful, and very old case on the Board's docket. Under that combination of circumstances, we were of the view that a judicial decree of enforcement would not be appropriate, but intimated, and later suggested, that some sort of information less than two years old might be pertinent to further consideration.

The important question in the case concerns the function of the court under the statute which controls us. Does the court have a modicum of judicial discretion in passing upon the petition for an enforcement decree? Or is it required to put the stamp of its authority automatically upon whatever request is made of it? The statute which governs the procedure[2] provides that the Board may petition the court and, if a petition be filed, shall file with the court the entire record of the proceedings. Then the statute provides:

"Upon such filing, the court . . . shall have jurisdiction of the proceeding and of the question determined therein, and shall have power . . . to make and enter upon the pleadings, testimony, and proceedings set forth in such transcript a decree enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part the order of the Board."

Thus, the Board is a petitioner in the court. The court has jurisdiction of the question in the case. The decree, when entered, is a judicial order. Violation of it is contempt of court. This procedure is not provided in all statutes. More often, an appeal is provided, and the

[2]Sec. 10(e) of National Labor Relations Act as amended, 61 Stat. 147 (1947) 29 U. S. C. A. §160(e).

administrative order, even when affirmed, remains an executive action.[3] The interposition of the judiciary as the enforcing agency must have some meaning. In Labor Board v. Crompton Mills,[4] the Supreme Court indicated quite definitely that the issuance of a decree and, if issued, its scope and terms are, to some extent at least, matters for consideration by the court. To the same effect are expressions in Labor Board v. Express Pub. Co.[5] Chief Judge Parker, writing for the Circuit Court of Appeals for the Fourth Circuit, discussed the problem in National Labor Rel. Bd. v. Norfolk Shipbuild. & D. Corp.[6] and summarized the answer by the expression "appropriate for present enforcement." With the views which he expressed, we agree. This was the rationale of Franks Bros. Co. v. Labor Board[7] and similar cases. While the original records in those cases were not recent, the petitions for enforcement decrees were upon fresh determinations by the Board that enforcement was presently appropriate.

Substantial considerations support the view that the court should require some reasonably recent indication that a decree is warranted. The function imposed by the Congress upon the courts by this statute is a major one. The Board was not given enforcement power; that power was lodged in the courts as a judicial function. Its exercise is not merely mechanical. The courts cannot, of course, refuse to issue enforcement decrees where the Board has found facts and reached conclusions which indicate that, in accordance with its judgment, enforcement is presently

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[3]The provisions of many statutes are collected and discussed in *Cyclopedia of Federal Procedure* §§7333-7369 (2d ed. 1944).

[4]337 U. S. 217 (1949).

[5]312 U. S. 426, 436-437, 85 L. Ed. 930, 61 S. Ct. 693 (1941).

[6]172 F. 2d 813 (1949).

[7]321 U. S. 702, 88 L. Ed. 1020, 64 S. Ct. 817 (1944).

appropriate. But surely enforcement must appear to be presently desirable before the solemn power of the courts is brought to bear upon the dispute. Idle, pointless court decrees are not helpful to enforcement of the law, but may be actually harmful. Law enforcement is an art; it is not the mere unthinking application of mathematical absolutes. Moreover, entry of decrees unrelated to present reality is not countenanced by our jurisprudence. In an ordinary law suit of the magnitude of the case at bar, we venture to say that no court would enter a mandatory or injunctive decree on data two years old.

Particularly, we do not think that this statute contemplates that the Board can pass on to the courts the problem of enforcement in extremely minor matters, without some showing of a reasonably recent necessity. The federal judiciary has had sad experience with a practice which put upon it the problems of magistrate courts.

Ordinarily these minor disputes are soluble by reasonable conciliatory efforts. No evidence of any such attempts on the part of the Board's representatives appears in this record. There were the one call by the field examiner, the formal notices and letters, the adversary proceeding in most formal fashion, and no more. Clearly, this minor controversy was inserted in some administrative procedural slot and, solely by reflection of the importance of the processes through which it was put, was magnified to noticeable size. The inflexibility of the Board's consideration is well illustrated by what it tells us, in its brief, concerning an election, which was suggested by these respondents. The Board says:

"A well-conducted election calls for expert and experienced judgment in providing procedures and safeguards in such essential matters as (1) unsuggestive

statement of the issue; (2) preparation of eligibility lists; (3) identification of voters; (4) time limits upon and methods for challenges to the eligibility of voters; the marking of a ballot, or the phase of an election; (5) tally of ballots; (6) impounding of disputed ballots; (7) opportunity to place observers; (8) announcement and certification of results; and (9) methods for resolving disputes which inevitably arise in connection with an election."

All this necessary formality is explained to us when the question at issue is the choice of a union by six out of ten bellboys and housemaids in a very small hotel.

We held, and we hold, on the basis of the whole record before us, that an enforcement decree ought not to be entered in this case in the absence of any showing whatever, based on reasonably recent inquiry, that a decree of court is appropriate or necessary.

In our first opinion, we made reference to the findings of the Board but found it unnecessary to examine the substance of the evidence supporting them. The statute governing this proceeding[8] provides: "The findings of the Board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall be conclusive." It is established that substantial evidence is evidence upon which a reasonable man would act in his own affairs. Upon this record as a whole, there is no such evidence supporting the findings of unfair labor practices or refusal to bargain. We have discussed the

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[8] *Supra* note 1.

matter of the poll. The affair of the housekeeper and the bellboy was even less substantial. On the witness stand the housekeeper said that she and the bellboy were "kidding," and she did not testify to any threat. The Board's counsel, who presented her as a witness, pleaded surprise and produced an affidavit which had previously been secured from the witness. When he offered it and opposing counsel objected, the trial examiner said, "I don't see what the whole thing amounts to anyway." Forthwith the discussion on the item was dropped. Nevertheless, in the final finding, one of the two unfair labor practices charged to the employers was one sentence taken from that affidavit. In its context and in the setting of the testimony, the remark, even if made, was a casual and inconsequential exchange of banter between the lady and a teasing bellboy. The trial examiner's remark at the time seems to be an accurate evaluation.

As to the failure or refusal to bargain, it is true that the attorney for the Union testified on direct examination that he received no answers to his letters to the owners and that "I received no affirmative answer to my request for a meeting for collective bargaining." But on cross-examination he testified that the owner referred him to counsel, that he talked to counsel several times, that they rehashed the matter of the cross-check, and that counsel contended that so far as the company knew the Union did not represent the employees. There was no evidence that any representative of the Board took any steps whatever to assure or reassure the employers, beyond the mailing of the formal Report on Cross-Check. This perplexity of the employers is translated by the Board into refusal and defiance. That the employers had a right to test the validity

of the selection of one purporting to be the bargaining representative of the employees is established.[9] That test came upon the hearing of the complaint. There is no evidence whatever in this record as to the employers' attitude or action after the order of the Board was issued. An employer cannot test that selection if his protest is to be treated as an unfair labor practice and his action after the announcement of the result is treated as immaterial.

What this court has done, and does, in this case is to say to the Board: In so insignificant a controversy, upon events which occurred so long ago, upon such shadowy evidence, ascertain by some reasonably adequate and certain inquiry whether these employers are refusing to bargain with the duly designated representative of their employees and whether their practices do in reasonable reality require a decree of court.

We have not said, and do not say, that if these employers refuse to bargain with the duly designated representative of their employees, even if the unit is only ten people, we will not issue an enforcement decree. We do say that if the Board insists upon court decrees in matters of this insignificant character, it must present reasonably recent and accurate information upon which the court may act.

The opinion, order and decree of this court of September 27, 1948, which were vacated March 1, 1949, for the purposes of the rehearing are hereby reinstated and, as supplemented by this opinion, are made the opinion, order and decree of the court.

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[9] *Norris, Inc., v. N. L. R. B.*, U. S. App. D. C., May 27, 1949.

STEPHENS, *Chief Judge,* dissenting: I think the order of the Board must be enforced. In my view, there is substantial evidence to support the finding of the Board that the respondents' housekeeper—supervisor of maid service—threatened discharge of employees, to wit, maids, if they joined a union. It is true that in one part of the housekeeper's testimony she said that she did not make such a threat. But immediately afterwards, when shown an affidavit the signature upon which she identified as her own, she testified that a statement therein that she had told a bellboy that if the maids joined a union she would "fire" them was true. The Board's trial examiner found that this was not a mere isolated statement, but that it reflected the attitude of the management of the hotel—this because the hotel manager had stated to representatives of the union who called upon him to request that he bargain collectively with them: "Well, if they [the employees] belong to the Union, why are they working here?" The testimony as to this statement was uncontradicted. The Board adopted the trial examiner's finding. The conflict within the testimony of the housekeeper was for the Board to resolve as a trial tribunal. Labor Board v. Link-Belt Co., 311 U. S. 584 (1941).

I think there is substantial evidence to support the finding of the Board that the respondents' manager took a poll of the employees to determine whether or not they desired to be represented by the union. At several points in the course of the hearing before the trial examiner, the manager testified that he had taken a vote or questioned the employees as to whether they wanted the union or not. At one point he testified that: "After hearing from the union I questioned each employee as to whether

they wanted the union or not, and I am of the impression that they do not want a union." It is true that on direct examination by counsel for the respondents, the manager testified that in connection with the arrangements for a cross-check he was given the impression by representatives of the Board that he was himself entitled to take a vote of the employees.[1] But on cross-examination by counsel for the Board, the manager, when asked whether a representative of the Board had said anything to him before he signed the cross-check agreement about an election held by secret ballot as one of the means used by the Board to determine bargaining agents, said that he did not remember that the representative had made any such statement and that the representative gave him no other choice than the cross-check. Moreover, the cross-check agreement, signed by the manager, was introduced in evidence and it shows upon its face that the "cross-check of appropriate Union and Employer records shall be made under the direction and supervision of the Regional Director . . ." Thus again there is a conflict in the evidence which it was for the Board to resolve as a trial tribunal.

I think there is substantial evidence to support the finding of the Board that the union had been chosen as collective bargaining agent by a majority of the respondents' employees in the appropriate unit. Authorization cards authenticated by the uncontradicted testimony of a business agent of the union were received in evidence. They

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[1]A cross-check is a procedure carried out by the Board under an agreement between a union and an employer for the purpose of ascertaining whether or not signature cards, offered by the union as evidencing a majority vote of employees selecting it as a bargaining agent, are in truth cards executed by *bona fide* employees of the industrial unit in question.

show that a majority of the respondents' employees in the appropriate unit (including maids, bellboys and houseman) designated the union as their representative for collective bargaining. The correctness of the finding of the Board that the respondents refused to bargain collectively with the union is not in dispute.

It is not in dispute that threatening discharge of employees if they join a union, conducting a poll to determine whether or not employees desire to be represented by a union, and refusing to bargain with a duly selected collective bargaining representative are unfair labor practices on the part of an employer.

The foregoing reflects the view which I more briefly expressed in my separate opinion on the original decision of this case. I nevertheless then thought that in view of the two-year lapse of time between the selection of the union as the collective bargaining representative of the employees and the enforcement proceeding, and in view of the likelihood of change of employee personnel during that time, the court should decline to enforce the order of the Board until shown by the Board that the conditions found to have existed as the basis for its order continued to exist. But a petition for rehearing was granted after the original decision of the case, and after hearing the argument and considering the authorities presented at the rehearing, I have concluded that my view—expressed in my separate opinion on the original decision of the case —that the order of the Board should not be enforced on the present record, was in error. In Franks Bros. Co. v. Labor Board, 321 U. S. 702 (1944), wherein it appeared that a union, subsequent to a wrongful refusal to bargain,

had lost its majority among the employees, the Supreme Court held that the Board's order to bargain must nevertheless be enforced. The Court said:

". . . One of the chief responsibilities of the Board is to direct such action as will dissipate the unwholesome effects of violations of the Act. See 29 U. S. C. §160(a) and (c). And, "It is for the Board, not the courts, to determine how the effect of prior unfair labor practices may be expunged." International Association of Machinists v. Labor Board, 311 U. S. 72, 82.

That determination the Board has made in this case and in similar cases by adopting a form of remedy which requires that an employer bargain exclusively with the particular union which represented a majority of the employees at the time of the wrongful refusal to bargain despite that union's subsequent failure to retain its majority. The Board might well think that, were it not to adopt this type of remedy, but instead order elections upon every claim that a shift in union membership had occurred during proceedings occasioned by an employer's wrongful refusal to bargain, recalcitrant employers might be able by continued opposition to union membership indefinitely to postpone performance of their statutory obligation. . . .

Contrary to petitioner's [Franks Bros.] suggestion, this remedy, as embodied in a Board order, does not involve any injustice to employees who may wish to substitute for the particular union some other bargaining agent or arrangement. For a Board order which requires an employer to bargain with a designated union is not intended to fix a permanent bargaining relationship without regard to new situations that may develop. See Great Southern

Trucking Co. v. Labor Board, 139 F. 2d 984, 987. But, as the remedy here in question recognizes, *a bargaining relationship once rightfully established must be permitted to exist and function for a reasonable period in which it can be given a fair chance to succeed.* See Labor Board v. Appalachian Power Co., 140 F. 2d 217, 220-222; Labor Board v. Botany Worsted Mills, 133 F. 2d 876, 881-882. *After such a reasonable period* the Board may, in a proper proceeding and upon a proper showing, take steps in recognition of changed situations which might make appropriate changed bargaining relationships. Id., see 29 U. S. C. §159 (c). [Italics supplied] [321 U. S. at 704-706]

Since in the instant case it is not in dispute that the respondents refused to bargain with the union, and not contended by the respondents that they have complied with the order of the Board since its issuance, but contended only that the order was improper and invalid, the Franks Bros. case is, in my view, clearly controlling upon this court. Other decisions to similar effect are: National Labor Relations Board v. The Andrew Jergens Company, No. 12,051, decided May 17, 1949 (C. C. A. 9th); National Labor Relations Board v. Todd Co., 173 F. (2d) 705 (C. C. A. 2d 1949); National Labor Relations Board v. Arnolt Motor Co., 173 F. (2d) 597 (C. C. A. 7th 1949); National Labor Relations Board v. Norfolk Shipbuild. & D. Corp., 172 F. (2d) 813 (C. C. A. 4th, 1949).

It is to be noted, moreover, that in view of 29 U. S. C. §160(f) (1946), the respondents could have sought prompt judicial review of the Board's order had they seen fit to do so. See National Labor Relations Board v.

Todd Co., supra. Therein the Court of Appeals for the Second Circuit said:

. . . The Company contends that enforcement of the Board's order should be denied because the Board waited from October 4, 1946 until January 23, 1948, to seek enforcement through a court order. We cannot agree. The company could have sought prompt judicial review of that order, under 29 U. S. C. A. §160(b). Not having done so, and having failed to comply with that order, it is in no position to complain of any change of circumstances during the period of non-compliance.[2] [173 F. (2d) at 708]

It may well be that, as suggested by my brethren, this case could have been dealt with more effectively by the Board through conciliation than through an adversary proceeding, i. e., through a complaint charging unfair labor practices. But this, I think, is a matter of administrative policy and not one for judicial direction. Moreover, the fact that the industrial unit is small is, in my view, not a proper basis for refusing to enforce the order of the Board. Employees in a small industrial unit may be even more in need, in order that they may enjoy the rights of free choice of representatives for collective bargaining guaranteed by the National Labor Relations Act, of the protective action of the Board through an unfair labor practice proceeding than employees who, in a large unit, because of their strength of numbers and lesser proximity with supervisors, are less susceptible to interference with these rights. In any event, the rules for

[2]The reference to Section 160(b) of the statute is in error. The correct reference is Section 160(f).

review and enforcement of the Board's orders are the same whether the case be of "minor" or "major" character.

I think the case cannot properly be disposed of adversely to the Board upon the ground that commerce as defined in the Act is not affected as required by the Act for jurisdictional purposes. Under 29 U. S. C. §152(6) (1946), commerce, so far as relevant to this case, means "trade . . . within the District of Columbia . . ."; and under Section 152(7) the term "affecting commerce" is defined to mean those acts which burden the free flow of commerce, and those acts which tend to lead to labor disputes which burden the free flow of commerce. It was stipulated before the trial examiner that during the calendar year 1945 the respondents' gross income exceeded $75,000, and that their purchases exceeded $25,000. The trial examiner so found and the Board adopted the finding. In view of this record I think it must be said that commerce within the District of Columbia is involved. And the finding of the trial examiner, adopted by the Board, that the activities of respondents "have a close, intimate, and substantial relation to trade, traffic and commerce within the District of Columbia, and tend to lead to labor disputes burdening and obstructing such commerce and the free flow of commerce," has not been contested at any stage of the case.

It is true that the Board held in the White Sulphur Springs Company case, No. 9-RC-392 (1949), that a cessation of seemingly substantial expenditures and activities in interstate commerce would have such a remote and indirect effect upon such commerce that to assert juris-

diction would not effectuate the policies of the Act. But it does not follow that the Board would rule that the cessation of such expenditures and activities in local commerce would have such a remote and indirect effect upon that commerce that to assert jurisdiction would not effectuate the policies of the Act in a situation where the Board has authority to deal with acts in and affecting local commerce, as in the District of Columbia and the Territories. The statement of the Board in the White Sulphur Springs Company case that it has been its administrative policy adhered to since 1935 not to assert jurisdiction over the hotel industry overlooks the exercise of jurisdiction by the Board in the instant case. Moreover, I think the Board cannot properly, under the Act, have a general policy which would forbid the exercise of its jurisdiction in a particular case where, as in the instant case, commerce is involved and where, as found in the instant case, the activities of the employer have a substantial relation to commerce and tend to lead to labor disputes burdening and obstructing such commerce and the free flow thereof.